

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUL 1 7 2012

Mr. Jesse Coleman Greenpeace USA 702 H Street N.W. Suite 300 Washington, DC 20001

Re: FOIA Request HQ-FOI-02181-11

Dear Mr. Coleman:

On behalf of the Environmental Protection Agency (EPA), I am writing to provide you, on the rolling basis to which we have agreed, with these records responsive to the abovereferenced Freedom of Information Act request. You seek copies of records received or prepared by former Agency employee, Mr. David Schnare that pertain to his outside activities and contain certain key words provided to EPA.

As you know, Mr. Schnare, who retired from federal service effective Friday, September 30, 2011, was employed as an attorney-advisor in the Air Enforcement Division of the Office of Enforcement and Compliance Assurance.

Enclosed please find this partial response to your request, resulting from the search of a forensic copy of the agency computer used by Mr. Schnare immediately after his retirement from federal service. This search was performed by forensic analysts in EPA's Office of the Inspector General. Following execution of the search, Office of Civil Enforcement personnel reviewed the results in order to determine which, if any, were responsive to your request. As you have discussed with OCE staff, some portions (very little) of the records produced by EPA today are being withheld because they are exempt under Exemptions 5 and/or 7 of FOIA as attorney-client privileged or enforcement-confidential communications.

Further, as you have also discussed with OCE staff, EPA will continue to search for records on certain identified agency servers, and EPA will produce any additional responsive records on a rolling basis.

If you are not satisfied with my action on this request, you may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch (2822T), 1200 Pennsylvania Avenue, NW, Washington, DC 20460 (U.S. Postal Service only), or by fax: (202) 566-2147, or by email: hq.foia@epa.gov. Only items mailed through the U.S. Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004.

Your appeal must be in writing and submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should clearly identify the determination being appealed, including the assigned FOIA request number (RIN) shown above. For the quickest possible handling, both the appeal letter and its envelope should be clearly marked "Freedom of Information Act Appeal."

Please feel free to contact me at (202) 564-4003 if you have any further questions.

Sincerely yours,

Sounjay K. Gairola

Air Enforcement Division

Attachments



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

NOV 0 8 2012

DEFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

Mr. Jesse Coleman Greenpeace USA 702 H Street N.W. Suite 300 Washington, DC 20001

Re: FOIA Request HQ-FOI-02181-11

Dear Mr. Coleman:

On behalf of the Environmental Protection Agency (EPA), I am writing to you to inform you that we have provided you all releasable records responsive to the above-referenced Freedom of Information Act request. You sought copies of records received or prepared by former Agency employee, Mr. David Schnare that pertain to his outside activities with the American Traditions Institute.

As you know, Mr. Schnare, who retired from federal service effective Friday, September 30, 2011, was employed as an attorney-advisor in the Air Enforcement Division of the Office of Enforcement and Compliance Assurance.

EPA has provided you all releasable records in rolling, interim responses to your request. These records were identified pursuant to a search of forensic copies of the agency computer used by Mr. Schnare immediately before his retirement from federal service as well as several network drives to which Mr. Schnare had access during his employment. The search was performed by forensic analysts in EPA's Office of the Inspector General. Following execution of the search, Office of Civil Enforcement personnel reviewed the results in order to determine which, if any, were responsive to your request. As you have discussed with OCE staff, some portions of a few records produced by EPA (records containing recovered portions of files that had been deleted from Mr. Schnare's computer) were withheld because they are exempt under Exemptions 5 and/or 7 of FOIA as attorney-client privileged or enforcement-confidential communications.

If you are not satisfied with my action on this request, you may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch (2822T), 1200 Pennsylvania Avenue, NW, Washington, DC 20460 (U.S. Postal Service only), or by fax: (202) 566-2147, or by email: https://doi.org/10.2009/j.gepa.gov. Only items mailed through the U.S. Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004.

Your appeal must be in writing and submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should clearly identify the determination being appealed, including the assigned FOIA request number (RIN) shown above. For the quickest possible handling, both the appeal letter and its envelope should be clearly marked "Freedom of Information Act Appeal."

This information is being made available to you under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, and Agency regulation, 40 CFR Part 2, as amended. Section 2.120 of the above referenced regulation authorizes the assessment of a fee to cover the search and reproduction cost incurred by the Environmental Protection Agency in complying with information requests where the total cost to the Agency exceeds \$25.00. Because you requested and were granted a fee waiver, there is no fee associated with your FOIA request.

Please feel free to contact Sounjay K. Gairola of my staff at (202) 564-4003 if you have any further questions.

Sincerely yours,

Phillip A. Brooks

Director

Air Enforcement Division

Cc: Lee Henson FOIA Office



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

NOV 1 3 2012

OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

Mr. Peter J. Fontaine Cozen & O'Connor 457 Haddonfield Road, Suite 300 Cherry Hill, NJ 20001

Re: FOIA Request HQ-FOI-00175-12

Dear Mr. Fontaine:

On behalf of the Environmental Protection Agency (EPA), I am writing to inform you that we have provided you all releasable records received or prepared by former Agency employee Mr. David Schnare that pertain to his outside activities with the American Traditions Institute and contain certain key words provided to EPA.

As you know, Mr. Schnare, who retired from federal service effective Friday, September 30, 2011, was employed as an attorney-advisor in the Air Enforcement Division of the Office of Enforcement and Compliance Assurance.

In total, two partial responses to your FOIA request were sent to you following our agreement to produce records on a rolling basis. These responses resulted from the search of a forensic copy of the agency computer used by Mr. Schnare immediately after his retirement from federal service and from searches of forensic copies of several network drives to which Mr. Schnare had access during his employment. The searches were performed by forensic analysts in EPA's Office of the Inspector General. Following execution of the searches, Office of Civil Enforcement personnel reviewed the results in order to determine which, if any, were responsive to your request. As you have discussed with OCE staff, some portions of a few records produced by EPA (records containing recovered portions of files that had been deleted from Mr. Schnare's computer) were withheld because they are exempt under Exemptions 5 and/or 7 of FOIA as attorney-client privileged or enforcement-confidential communications.

We have concluded our extensive search of Mr. Schnare's records and have released all publically releasable records to you.

You may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: https://doi.org/10.2007/pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J,

Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI Number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

This information is being made available to you under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, and Agency regulation, 40 CFR Part 2, as amended. Section 2.120 of the above referenced regulation authorizes the assessment of a fee to cover the search and reproduction cost incurred by the Environmental Protection Agency in complying with information requests where the total cost to the Agency exceeds \$25.00. As shown on the enclosed Bill of Collection, the amount due is \$8,309.15. Please remit this amount to the name and address on the bill.

I hope this fulfills your request appropriately. Should you have any questions you may contact Sounjay K. Gairola of my staff at (202) 564-4003.

Sincerely yours

Phillip Bro

Director

Air Enforcement Division

cc: Lee Henson FOIA Office



VIRGINIA.docx

David Schnare to: schnareati

From:

David Schnare/DC/USEPA/US

To:

schnareati@gmail.com

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

- VIRGINIA docx

09/19/2011 03:36 PM

VIRGINIA: IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

THE AMERICAN TRADITION INSTITUTE, and THE HONORABLE DELEGATE ROBERT MARSHALL

Petitioners,

V.

RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA.

Respondent.

Civil Docket No. CL 11-3236

Petitioners' Sur-Reply in Opposition to the Motion to Intervene

SUR-REPLY IN OPPOSITION TO PROSPECTIVE INTERVENOR'S MOTION TO INTERVENE

At the September 16, 2011, motions hearing on the above titled matter, the Court granted Petitioners leave to file a sur-reply to provide the Court with additional case law and University policies relevant to consideration of a motion to intervene by Mr. Michael Mann. The list below identifies the issues before the court, the Petitioners' previously cited authorities and, in *bold italics*, the additional case law, University policies and exhibits Petitioners now place before the Court.

I. Can Mr. Mann serve as a Respondent when he is not the custodian of the emails?

Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190, 1210 (4th Cir. Va. 1976) ("the [federal] FOIA itself, it would seem, confers on a supplier of private information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information.")

II. Does Mr. Mann have an expectation of privacy in his emails?

<u>Petitioners' Exhibit 2</u>, University of Virginia, Three emails disclosed by the Respondent in response to the Petitioners' Virginia Freedom of Information Request in this matter.

- <u>Petitioners' Exhibit 10</u>, University of Virginia, Compact disk containing 1,793 emails emails disclosed by the Respondent in response to the Petitioners' Virginia Freedom of Information Request in this matter.
- <u>Petitioners' Exhibit 3</u>, University of Virginia, "Email Guidelines, Records Management" ("Records . . . are subject to the Virginia Freedom of Information Act.)
- <u>Petitioners' Exhibit 4</u>, Commonwealth of Virginia Department of Human Resource Management "Policy: 1.75", 3/17/11 ("All employees must comply with this policy and any additional polices that may be adopted by the agency or institution of the Commonwealth where the user is working." and see, "No user should have any expectation of privacy in any message, file, image or data created, sent, retrieved or received by use of the Commonwealth's equipment and/or access.")
- <u>Petitioners' Exhibit 5</u>, University of Virginia, "IT Policies Monitoring and Review of Employee Electronic Communications or files" 10/03/01 ("No user should have any expectation of privacy in any message, file, image or data created, sent, retrieved or received by use of the Commonwealth's equipment and/or access." Citing to The Commonwealth of Virginia's Human Resource Policy 1.75.)
- <u>Petitioners' Exhibit 6</u>, University of Virginia, "Email Retention Checklist" ("Your email is part of your job. No expectation of privacy or confidentiality applies.")
- Deschenie v. Bd. Of Educ. Of Central Consol. Sch. Dist., 473 F.3d 1271,1281 (10th Cir. 2007) ("It is irrelevant that Deschenie did not intend for this letter to be so published because the speech, as ultimately printed, including her title, thus connecting CCSD [Central Consolidated School District] to the letter."
- Petitioners' Exhibit 11, University of Virginia, "Brief of Appellees" in the matter of Bowers v. UVA, No. 07-1382, (4th Cir., July 31, 2007) 2007 WL 2406588 (C.A.4)(Appellate Brief) ("Additionally, nobody would think to use University letterhead for personal messages, and email signatures like the one in this case resemble official letter head closely enough that the two should be treated the same way.")
- Hard Drive Prods. v. Doe, 2011 U.S. Dist. LEXIS 73159 (E.D. Va. July 1, 2011 ("Defendants do not have an expectation of privacy in the reproduction and distribution of the electronic media without the permission of the copyright holder. See Warner Bros. Records Inc., 2008 U.S. Dist. LEXIS 100566, 2008 WL 5111884, at *30-31.")

III. Does Mr. Mann have a property interest in the emails or are they Public Records?

<u>Petitioners' Exhibit 8</u>, University of Virginia "UVA Financial & Administrative Policy XV.E.1" (May 30, 1998):

2.3 Ownership

Work-for-Hire Rule. The "work-for-hire" rule, defined in the Copyright Act, provides that when an employee produces a copyrightable work within the scope of employment, the copyright to that work belongs to the employer and not to the author.

2.4 Employee Ownership

The employee owns the rights to any work created at his or her own initiative and outside the scope, time, and place of employment. The University cedes copyright ownership to the author(s) of scholarly and academic works (such as journal articles, books, and papers) created by academic and research faculty who use generally available University resources. However, the University asserts its right of copyright ownership if significant University resources (including sponsor-provided funds) are used in the creation of such works, and: (a) the work generates royalty payments; or (b) the work is of commercial [proprietary] value that can be realized by university marketing efforts." (emphasis added).

<u>Petitioners' Exhibit 3</u>, University of Virginia, "Email Guidelines, Records Management" ("email correspondence is a public record, according to the Virginia Public Records Act.")

Va. Code 42.1-77 (Virginia Public Records Act – Definitions):

"Public record" or "record" means recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency. Regardless of physical form or characteristic, the recorded information is a public record if it is produced, collected, received or retained in pursuance of law or in connection with the transaction of public business. The medium upon which such information is recorded has no bearing on the determination of whether the recording is a public record.

Virginia Freedom of Information Advisory Council, Opinion AO- 1-00, September 29, 2000:

"FOIA, however, does define "public records" as all writings and recordings which consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. In order for a writing or

recording to fall within the definition of "public record," it must be as described in the definition and be related to the transaction of public business. Implicit in the definition is that not all writings and recordings, etc., are public records. Because the definition of "public records" includes those stored in electronic form, e-mail messages related to public business are covered by FOIA. (emphasis added).

- Petitioners' Exhibit 12, University of Virginia, Promotion and Tenure Policy (March 1, 2000) (Section III establishes three elements to a faculty member's job, to wit, teaching, research and service; and see, at Section VI, "Service to one's professional discipline and, in a number of disciplines, to the broader public is important and sometimes essential in terms of job definition.")
- Garcetti v. Ceballos, 547 U.S. 410, 421 (U.S. 2006) ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from [from state authorities, including FOIA]).

IV. Is Mr. Mann a "Bystander"?

- Mitchell Mt., LLC v. Bd. Of Supervisors, 70 Va. Cir. 294, 295 (Va. Cir. Ct. 2006)
 ("[Rule 3.14] does not allow a party to intervene merely because of concerns, legitimate or unfounded, about what might result from a trial court's decision in a case."
- Eads v. Clark, 272 Va. 192 (Va. 2006) (distinguishing a proper defendant from "mere bystanders".)
- Shank v. Department of Social Services, 217 Va. 506, 510-11 (Va. 1976) (A birth mother is a mere bystander in an adoption proceeding.)
- Wood v. Snipes, 1997 Va. App. LEXIS 562, 3-4 (Va. Ct. App. Aug. 26, 1997) (concern over reputation establishes no right or claim supporting intervention.)

V. Who owns the right to academic freedom, if any, under the First Amendment?

- Sweeze v. New Hampshire, 354 U.S. 234, 263 (U.S. 1957) (Frankfurtre, J., Concurring) (It is the university's right to academic freedom).
- Urofsky v. Gilmore, 216 F.3d 401, 410-12 (4th Cir. Va. 2000) (emphasis below added)

"to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors." and,

the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom. Cf. Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 287, 79 L. Ed. 2d 299, 104 S. Ct. 1058 (1984) (stating that the Court has not recognized a First Amendment right of faculty to participate in academic policymaking)

Stronach v. Va. State Univ., 2008 U.S. Dist. LEXIS 2914, 7-8 (E.D. Va. Jan. 15, 2008) ("However definite the university's right to academic freedom is after Sweezy, it is clear that it is the university's right and not the professor's right.")

Respectfully Submitted,

THE AMERICAN TRADITION INSTITUTE and THE HONORABLE ROBERT MARSHALL

by:		
	Counsel	-

David W. Schnare (VSB 44522) 9033 Brook ford Road Burke, VA 22015 571-243-7975 schnareati@gmail.com Attorney for Petitioners

Dated: September 21, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2011, I served by U.S. Post, a true and correct copy of the foregoing Sur-Reply on:

Richard C. Kast, Esq., Office of General Counsel, University of Virginia, Charlottesville, Virginia 22904 Attorney for Respondent

Scott Newton, Esq.,
Stephens, Boatwright, Cooper, Coleman & Newton
9255 Lee Avenue,
Manassas, Virginia 20110
Local Counsel for the Potential Intervenor

By:		
0.00	David W. Schnare	

Dated: September 21, 2011



AO-1-00

David Schnare to: schnareati

From:

David Schnare/DC/USEPA/US

To:

schnareati@gmail.com

AO-1-00

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov



09/19/2011 02:23 PM

RE: Monday []

David Schnare to: Schnare, Marlae

04/29/2011 11:42 AM

From:

David Schnare/DC/USEPA/US

To:

"Schnare, Marlae" <Marlae.Schnare@fairfaxcounty.gov>

OK. :-(((

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

"Schnare, Marlae"

No, sorry - two reasons (1) Dave Foreman will b...

04/29/2011 11:31:44 AM

From: To:

"Schnare, Mariae" <Mariae.Schnare@fairfaxcounty.gov>

Date:

David Schnare/DC/USEPA/US@EPA

04/29/2011 11:31 AM

Subject: RE: Monday

No. sorry - two reasons (1) Dave Foreman will be there all day and (2) I don't believe it's our office anymore. :-) Dave is meeting with Ryan from Cook's office to discuss, among other things, what to do with the office and the County Auditor really wants the space as well so it may be neither of ours soon, but in any case, Dave will be there meeting with other folks that day as well and Pat may be there too. may be the last time.

Sorry.

Marlae Schnare Senior Legislative Aide Office of Supervisor Pat Herrity 703-451-8873 Website / Newsletter / Pacebook / LinkedIn

----Original Message----

Prom: Schnare.David@epamail.epa.gov [mailto:Schnare.David@cpamail.epa.gov] Sent: Priday, April 29, 2011 11:03 AM

To: Schnare, Marlac Subject: Monday

Is there any way Chris Horner and I can use your conference room at the Government Center Monday afternoon? He has morning meetings in Fair Lakes, and it would be easy for us to meet there? d

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov I note parenthetically that the Library of Virginia has had to grapple with the question of what constitutes records related to the transaction of public business in the context of the Virginia Public Records Act (§ 42.1-76 et seq.). Although the primary purpose of this Act is to set standards for the retention of public records, the guidelines established by the Library of Virginia pursuant to the Virginia Public Records Act distinguish between e-mails that are public records (and hence subject to retention) and those that are not. Examples of "non-records" include personal messages or announcements, convenience or reference copies, phone message reminders, routine chat on e-mail listservers, and announcements of social Imaging Services Division of the Library of Virginia.

Your second question is whether, under FOIA, an e-mail transmitted through a government computer database is different in any way from a paper letter on government stationery.

The substance of my response to your previous question concerning e-mail messages and government databases is applicable to this question. For your information, the Virginia Freedom of Information Advisory Council is currently examining the nature of e-mail and other electronic communication in the context of FOIA's open records and meeting requirements.

3. Your third question contains two parts; first, can a charge of several thousand dollars for the production of any e-mail from within the previous two weeks be considered "reasonable"; and second, assuming that the estimated cost is accurate, whether a government entity has an obligation to reduce the cost of

Subsection F of § 2.1-342 of the Code of Virginia provides:

A public body may make reasonable charges for its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication.

FOIA authorizes public bodies to make reasonable charges for their actual cost for the production of requested records. Regardless of the public body involved in the instant case, it appears they have exercised their statutory prerogative. While I assume that the charge is the actual cost, the question of whether or not that charge is reasonable is one for the courts and not this office. As to the second part of your question, any portion of a charge ruled to be unreasonable likely would not be permitted.

4. Your fourth question is whether any communication between a county administrator or school superintendent and the governing board members is exempt under the "working papers" exemption authorized under subdivision A6 of § 2.1-342.01.

The "working papers" exemption is essentially an executive privilege and extends to the Office of the Governor, Lieutenant Governor, the Attorney General; the members of the General Assembly or the Division of Legislative Services; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education. (Emphasis added) Opinions of the Attorney General have held that school superintendents are purposes of FOIA.²

Subdivision A6 of § 2.1-342.01 also defines "working papers" as those records prepared by or for an above-named public official for his personal or deliberative use. (Emphasis added.)

To the extent that the communications are prepared for the chief executive officer for his personal or deliberative use, the "working papers" exemption may be properly invoked. However, once the communication is disseminated to members of the governing body, it loses its exempt status. It is important to note, as stated earlier, that the "working papers" exemption is essentially an executive privilege and with the exception of the General Assembly, does not extend to governing bodies.

Your fifth question is whether the cost of legal review of requested materials may be considered a legitimate part of the cost of producing the record.

Subsection F of § 2.1-342 of the Code of Virginia provides:

A public body may make reasonable charges for its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication.

Subsection F of § 2.1-342 appears to preclude a charge for the legal review of requested materials because such a charge would be an intermediary fee to recoup the general costs associated with transacting the general business of the public body.

Your sixth question requests helpful guidance on the boundaries of "specific" as FOIA contemplates it.

From reviewing the attachments that accompanied your letter, I assume that this question concerns the requirement that requests for records made under FOIA identify the requested records with reasonable specificity. "Reasonable specificity" or "specific" are not defined terms under FOIA and therefore the statutory construction rules applied in your first question apply here. Webster's New Collegiate Dictionary (1977 Edition) defines "specific" as constituting or falling into a specifiable category, free from ambiguity. Common sense would dictate that a request needs to be specific enough to enable a public body to begin to process the request and, if clarification is required, to ask relevant questions to understand the scope of the request. Section 2.1-340.1 requires all public bodies and public officials to make reasonable efforts to reach an agreement with a requester concerning the production of the records requested. This provision presumes that the parties will talk to one another to facilitate the production of the requested records in a manner satisfactory to the parties.

Your final question asks for a comment on the appropriateness of a citizen using FOIA to gain routine access to the correspondence of members of a governing body.

Generally, FOIA provides a right of access to public records. The motive for the request is immaterial. Strictly speaking, your question is not one about the application of FOIA. The issue of the appropriateness of a request is not one for this office.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely.

Maria J. K. Everett Executive Director

¹Commonwealth Department of Taxation v. Orange-Madison Coop. Farm Service, 220 VA 655, 261 S.E. 2d 532 (1980), 1991 Op. Atty. Gen. Va. 140, 1988 Op. Atty. Gen. Va. 413, 1986-1987 Op. Atty. Gen. Va. 174; see generally Norman J. Singer, Statutes and Statutory Construction, 6th ed., §46:01.

²1976-77 Op. Atty, Gen. Va. 318,

³1982-82 Op. Atty. Gen. Va. 724 and 1975-76 Op. Atty. Gen. Va. 415.



UVA Argument David Schnare to: schnareati

09/15/2011 04:53 PM

From:

David Schnare/DC/USEPA/US

To:

schnareati@gmail.com

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

Doc3.docx

Intervention:

- Rule 3:14 as a petitioner or respondent to assert any claim or defense germane to the subject matter of the proceeding
- Mann wishes to enter to assert two claims to prevent release of the documents; privacy and first amendment rights.

Privacy and Public Records:

Privacy

- Mann claims his emails were private communications and not public
- Keep in mind, the FOIA request sought emails between scientists, not between Mann and students or Mann and his doctor or Mann and his family. And, UVA has not suggested there are any such emails in the collection.
- Assuming arguendo that they are private communications, and we do not agree that all of them are, UVA and Virginia policies clearly state he has no expectation of privacy in private communications and that they are subject to the Virginia FOIA
 - Exhibit 3 "Email guidelines" "Records that are retained by an individual, even if they are retained on an electronic medium, are subject to the Virginia Freedom of Information Act."
 - Exhibit 4 "DHRM Policy 1.75" on electronic communications Employees have no "expectation of privacy in any message, file, image or data created, sent, retrieved or received by use of the Commonwealth's equipment."
- UVA has never argued and does not now argue that Mann had an expectation of privacy, nor in this case did UVA honor any such expectation
 - UVA released "private" communications, see Exhibit 2
 - In the <u>Bowers</u> case, on behalf of UVA Mr. Kast argued "Additionally, nobody would think to use University letterhead for personal messages, and email signatures like the one in this case resemble official letterhead closely enough that the two should be treated the same way." 2007 WL 2406588 (C.A.4) ([UVA] Appellate Brief).

Public Records

Public Records are subject to FOIA and these emails are public records.

- "when public employees make statements pursuant to their official duties,
 the employees are not speaking as citizens for First Amendment purposes,
 and the Constitution does not insulate their communications [from state
 authorities, including FOIA]. Kast cited to this from <u>Garcetti v. Ceballos</u>,
 126 S.Ct. 1951, 1960 (2006) in his 4th Circuit appellate brief.
- Mann's official duties are described in the UVA Promotion and Tenure Policy:
 - The University establishes three elements to a faculty member's job, ""teaching," "research," and "service". Tenure Policy at § III. Only research and service are at issue in this case.
 - "Service to one's professional discipline and, in a number of disciplines, to the broader public is important and sometimes essential in terms of job definition." Tenure Policy at § VI.
- The FOIA Advisory opinion cited by UVA clearly indicates that records
 prepared within the context of the professor's University employment and
 in the transaction of public business are public records subject to FOIA. We
 note, however, this is an advisory opinion to the University, NOT a
 statement of law, and other than the soundness of its logic, it has no
 precedential authority to a court of law.
- Those emails associated with Mr. Mann's (1) research; (2) service to one's
 professional discipline, e.g. journal editor; and (3) service to the broader
 public, e.g. IPCC activities, are all public records as a matter of law
 (Garcetti), FOIA Advisory Committee opinion, and UVA interpretation of the
 law (Kast brief).
- Because Mann does not own the emails, has no control over them, has
 never had an expectation of privacy on them and because they are public
 records subject to the Virginia FOIA, even if some of them are private, he
 has no protectable legal interest in them that is germane to the subject
 matter of the proceeding.

First Amendment Rights

 UVA suggests Mann may have a personal interest in academic freedom in this case. Petitioners suggest in our brief what Justice Frankfurter made clear, here academic freedom belongs to the University of Virginia, not to Mr. Mann. Sweezy v. New Hampshire, 354 U.S. 234, 263 (U.S. 1957).

- The Fourth Circuit agrees with this formulation. In its oft cited decision, the 4th Circuit explained:
 - "to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors."

 <u>Urofsky v. Gilmore</u>, 216 F.3d 401, 410 (4th Cir. Va. 2000); and, see:
 - the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom. Cf. Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 287, 79 L. Ed. 2d 299, 104 S. Ct. 1058 (1984) [**27] (stating that the Court has not recognized a First Amendment right of faculty to participate in academic policymaking). Urofsky v. Gilmore, 216 F.3d 401, 411-412 (4th Cir. Va. 2000).
- However definite the university's right to academic freedom is after Sweezy, it is clear that it is the university's right and not the professor's right. In upholding a Virginia law making it illegal for state [*8] employees to surf internet content of a sexual nature on state-owned computers against a challenge by public university professors, the Fourth Circuit noted that "cases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual." Urofsky v. Gilmore, 216 F.3d 401, 414 (4th Cir. 2000) v. Gilmore, 216 F.3d 401, 414 (4th Cir. 2000). Stronach v. Va. State Univ., 2008 U.S. Dist. LEXIS 2914, 7-8 (E.D. Va. Jan. 15, 2008).
- Because any First Amendment based academic freedoms at issue in this
 case belong to the University and not to Mr. Mann, his interests are not at
 issue in this case, and he remains a bystander.

Stay

- Regardless as to whether Mr. Mann is allowed to intervene, nothing in the court's protective order sacrifices protection of his interests, whatever they may be.
- Mr. Horner and I are carefully and very closely controlled by the order. We
 may not tell anyone what we see and we may not even tell anyone what
 we do not see. We have one person in whom we can confide and that is
 you Judge Finch. No one has breathed even the merest suggestion that Mr.

- Horner or I are immoral, irresponsible, of fraudulent character or otherwise not of the fitness to undertake this purely magisterial task on behalf of the court, and if we forgive any utterly unfounded implication of unworthiness made by Mr. Mann's motion to stay.
- This matter has dragged on for far longer than the FOIA contemplates. UVA
 is already prepared to provide us with a diskette that will allow us the
 opportunity to organize the 6,200 emails and reduce the number
 significantly so the court need only examine exemplars in order to evaluate
 the legal arguments each side will make. Under the agreement, UVA allows
 an extremely limited examination of the documents, but avoids the
 significant effort of organizing and extracting exemplars.
- Because any legitimate party is protected under the order, because UVA is ready and willing to abide by the order, and because it is in the citizen's best interests and the goal of the Virginia FOIA, there is no valid reason to stay the order.

David Schnare to: schnareati

08/03/2011 03:53 PM

From:

David Schnaro/DC/USEPA/US

To:

schnareati@gmail.com

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

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WE ASSIGNED YOU AN EMPLOYER IDENTIFICATION NUMBER

Thank you for applying for an Employer Identification Number (SIN). We assigned you documents, even if you have no employees. Please keep this notice in your permanent

When filing tax documents, payments, and related correspondence, it is very important that you use your EIN and complete name and address exactly as shown above. Any variation may cause a delay in processing, result in incorrect information in your account, or even cause you to be assigned more than one EIN. If the information is not correct as shown above, please make the correction using the attached tear off stub and return it to us.

Assigning an EIN does not grant tax-exempt status to non-profit organizations. Publication 557, Tax Exempt Status for Your Organization, has details on the application process, as well as information on returns you may need to file. To apply either Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, or Form 1024, Application for Recognition of Exemption Under Section 501(a). Submit the completed form, all applicable attachments, and the required user fee to:

Internal Revenue Service PO Box 12192 Covington, KY 41012-0192

The Pension Protection Act of 2006 contains numerous changes to the tax law provisions affecting tax-exempt organizations, including an annual electronic notification requirement (Form 990-N) for organizations not required to file an annual information return (Form 990 or Form 990-EZ). Additionally, if you are required to file an annual information return, you may be required to file it electronically. Please refer to the Charities & Non-Profits page at www.irs.gov for the most current information on your filing requirements and on provisions of the Pension Protection Act of 2006 that may affect you.

To obtain tax forms and publications, including those referenced in this notice, visit our Web site at www.irs.gov. If you do not have access to the Internet, call 1-800-829-3676 (TTY/TDD 1-800-829-4059) or visit your local IRS office.

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 one time and the IRS will not be able to generate a duplicate copy for you.
- Use this EIN and your name exactly as they appear at the top of this notice on all your federal tax forms.
- Refer to this EIN on your tax-related correspondence and documents.
- Provide future officers of your organization with a copy of this notice.

If you have questions about your EIN, you can call us at the phone number or write to us at the address shown at the top of this notice. If you write, please tear off the stub at the bottom of this notice and send it along with your letter. If you do not need to write us, do not complete and return the stub. Thank you for your cooperation.

Keep this part for your records.

CP 575 E (Rev. 7-2007)

Return this part with any correspondence so we may identify your account. Please correct any errors in your name or address.

CP 575 E

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GEORGE MASON ENVIRONMENTAL LAW CLINIC 9033 BROOK FORD RD BURKE, VA 22015

George Mason Environmental Law Clinic CONFLICT OF INTEREST POLICY

Section 1 – Purpose: The purpose of the conflict of interest policy is to protect GM-ELC's interest when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or director of the GM-ELC or might result in a possible excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflict of interest applicable to nonprofit and charitable organizations.

Section 2 - Definitions:

- A. Interested Person: Any director, principal officer, or member of a committee with governing board delegated powers, who has a direct or indirect financial interest, as defined below, is an interested person.
- B. Financial Interest: A person has a financial interest if the person has, directly or indirectly, through business, investment, or family:
 - An ownership or investment interest in any entity with which GM-ELC has a transaction or arrangement,
 - A compensation arrangement with GM-ELC or with any entity or individual with which the GM-ELC has a transaction or arrangement, or
 - A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which GM-ELC is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial. A financial interest is not necessarily a conflict of interest. Under Section 3 (B), a person who has a financial interest may have a conflict of interest only if the appropriate governing board or committee decides that a conflict of interest exists.

Section 3 - Procedures:

- A. Duty to Disclose: In connection with any actual or possible conflict of interest, an interested person must disclose the existence of the financial interest and be given the opportunity to disclose all material facts to the directors regarding the proposed transaction or arrangement.
- B. Determining Whether a Conflict of Interest Exists: After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the board meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board members shall decide if a conflict of interest exists.

C. Procedures for Addressing the Conflict of Interest:

- An interested person may make a presentation at the board meeting, but after the presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.
- The board chairperson shall, if appropriate, appoint a disinterested person to investigate alternatives to the proposed transaction or arrangement.
- iii. After exercising due diligence, the board shall determine whether the Organization can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.
- iv. If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the board shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in GM-ELC's best interest, for its own benefit, and whether it is fair and reasonable. In conformity with the above determination it shall make its decision as to whether to enter into the transaction or arrangement.

D. Violations of the Conflicts of Interest Policy:

- If the board has reasonable cause to believe a member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.
- ii. If, after hearing the member's response and after making further investigation as warranted by the circumstances, the board determines the member has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

Section 4 – Records of Proceedings: The minutes of the governing board and all committees with board delegated powers shall contain:

A. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the board's decision as to whether a conflict of interest in fact existed. B. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings.

Section 5 - Compensation:

- A. A voting member of the board who receives compensation, directly or indirectly, from GM-ELC for services is precluded from voting on matters pertaining to that member's compensation.
- B. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from GM-ELC for services is precluded from voting on matters pertaining to that member's compensation.
- C. No voting member of the board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from GM-ELC, either individually or collectively, is prohibited from providing information to any committee regarding compensation.

Section 6 – Annual Statements: Each director or principal officer shall annually sign a statement which affirms such person:

- Has received a copy of the conflicts of interest policy,
- B. Has read and understands the policy,
- Has agreed to comply with the policy, and
- Understands GM-ELC is charitable and in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.
- Section 7 Periodic Reviews: To ensure GM-ELC operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:
 - A. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.
 - Whether partnerships, joint ventures, and arrangements with management organizations conform to GM-ELC's written policies, are properly recorded, reflect

reasonable investment or payments for goods and services, further charitable purposes and do not result in inurement, impermissible private benefit or in an excess benefit transaction.

Section 8 –Use of Outside Experts: When conducting the periodic reviews as provided for in Section 7, GM-ELC may, but need not, use outside advisors. If outside experts are used, their use shall not relieve the board of its responsibility for ensuring periodic reviews are conducted.

Adopted

July 29, 2011

David W. Schnare

Incorporator

David Schnare to: schnareati

08/03/2011 03:52 PM

David Schnare/DC/USEPA/US

To:

schnareati@gmail.com

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

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WASHINGTON POST COMPANY, Appellant v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Appellees

No. 88-5094

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

865 F.2d 320; 275 U.S. App. D.C. 101; 1989 U.S. App. LEXIS 97

December 9, 1988, Argued January 6, 1989, Decided

PRIOR HISTORY: tion No. 80-01681.

[**1] Appeal from the United States District Court for the District of Columbia, Civil Ac-

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, a newspaper company, sought review of judgment from the United States District Court for the District of Columbia, which granted summary judgment to appellee, Department of Health and Hum in Services. Appellant sought access under the Freedom of Information Act, 5 U.S.C.S. § 552, to financial disclosure forms filed by scientists who worked as consultants for the National Cancer Institute.

OVERVIEW: Appellant, newspaper company, sought access under the Freedom of Information Act (FOIA), 5
U.S.C.S. § 552, to financial disclosure forms filed by scientists who worked as consultants for the National Cancer Institut: Appellee, Department of Health and Human Services, opposed the disclosure. The district court granted summary judgment to appellee pursuant to a FOIA exemption that authorized the government to withhold confidential financial information obtained from third parties. On appeal, the court vacated the judgment. The court held that whether disclosure of the financial information would seriously impair the government's ability to gather information it needed from participating scientists in the future was a disputed factual issue. The court found that there was a conflict in the affidivits about what adverse consequences would result from public disclosure. The court remanded the case to enable both parties to address and contest the issue of impairment to provide the district court with a record from which to decide. The court held that appellee was barred on remand from pursuing a previously waived claim that there was a risk of future nonparticipation by scientists.

OUT COME: The court vacated the grant of summary judgment to appellee, Department of Health and Human Services, as d remanded the case. The court held that a disputed factual issue existed as to whether disclosure of the financial infornation sought by appellant, newspaper company, would seriously impair the government's ability to gather information it needed from participating scientists in the future.

Lexi: Nexis(R) Headnotes

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Trade Secrets & Commercial Information

Governments > Legislation > Interpretation

Trade Secrets Law > Federal & State Regulation > Freedom of Information Act Exemptions

[HN1] The Freedom of Information Act (FOIA) exemption 4 authorizes withholding commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C.S. § 552(b)(4). Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Trade Secrets & Commercial Information

[HN2] Commercial or financial information is confidential under exemption 4 of the Freedom of Information Act, i U.S.C.S. § 552, if disclosure is likely (1) to impair the Government's ability to obtain necessary information in the iuture; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > General Overview

[HN3] Fed. R. Civ. P. 56 authorizes a district court to grant summary judgment when it can be shown that there is 1.0 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate only in circumstances where the evidence is such that a reasonable jury could not return a verdict for the nonmoving party. The district court is obliged to view the available evidence in the light most favorable to the nonmoving party. At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. If a genuine dispute does exist over a material issue, then parties should be given the opportunity to present direct evidence and cross-examine the evidence of their opponents in an adversarial setting.

Administrative Law > Governmental Information > Freedom of Information > Enforcement > Standards of Review Civil Procedure > Summary Judgment > Standards > General Overview

[HN4] The general standards under Fed. R. Civ. P. 56 apply with equal force in the context of the Freedom of Information Act, 5 U.S.C.S. § 552.

Civil Procedure > Summary Judgment > Supporting Materials > Affidavits

[HN5] Where there is a conflict in the affidavits on a motion for summary judgment as to what adverse consequences will flow from the revelation of the facts contained in the documents sought to be disclosed, then it appears that there is indeed a conflict regarding very material facts which calls for some type of adversary procedure.

Civil Procedure > Appeals > Remands

[HN6] A party cannot raise anew on remand an issue that it failed to pursue in the appeal.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Trade Secrets & Commercial Information

Governments > Public Lands > General Overview

Trade Secrets Law > Federal & State Regulation > Freedom of Information Act Exemptions

[HN7] When a court applies a "rough balancing" under the Freedom of Information Act (FOIA) exemption 4, 5 U.S.C.S. § 552(b)(4), information will be withheld only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in National Parks I (and its progeny) militating against disclosure on the other side. More simply put, "minor" disadvantages flowing from disclosure cannot overcome the disclosure mandate of FOIA.

865 F.2d 320, *; 275 U.S. App. D.C. 101; 1989 U.S. App. LEXIS 97, **

COUNSEL: Paul Mogin, with whom Kevin T. Baine and Boisfeuillet Jones, Jr., were on the brief, for Appellant.

Mar'; E. Nagle, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney, and John D. Bates and R. Craig Lawrence, Assistant United States Attorneys, were on the brief, for Appellees.

JUEGES: Wald, Chief Judge, and Edwards and D.H. Ginsburg, Circuit Judges. Opinion for the Court filed by Chief Judge Wald.

OPINION BY: WALD

OPINION

[*321] WALD, Chief Judge:

For nine years, The Washington Post Company ("the Post") has been seeking access under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to certain financial disclosure forms filed by scientists who work as consultants for the National Cancer Institute ("NCI"). In the most recent chapter, the Post appeals the district court's grant of summary judgment to the Department of Health and Human Services ("HHS" or "the Department") pursuant to FOIA exemption 4, which authorizes the government to withhold financial information obtained from third parties that is "confider tial. [**2] "The Post claims that a genuine issue of material fact exists as to the effect of disclosure on impairment of the government's ability to obtain the information it needs from its scientist-consultants. We agree that such a dispute exists and that summary judgment was therefore inappropriate.

I. EACKGROUND

The NCI is a division of the National Institutes of Health ("NIH"), see 42 U.S.C. § 281, which is itself a part of HHS. The [*322] NCI is responsible for overseeing the disbursement of hundreds of millions of dollars each year to supp of cancer research. Aiding the NCI in its duties are hundreds of part-time "consultants," prominent scientists who volunteer to serve on NCI advisory "peer review" committees to evaluate various grant and contract proposals.

An invitation to serve as a consultant is contingent upon the scientist's completion of Form HHS-474 (formerly HEV'-474), entitled "Confidential Statement of Employment and Financial Interests." First required by Executive Order No. 1,222, 'the form is designed to elicit appointees' potential conflicts of interest. Appointees are asked, inter alia, to list a lorganizations in which you. [**3] your spouse, minor child, partner, or an organization with which you are connected have financial interests which relate directly or indirectly to your consultant duties."

3 C.F.R. § 306 (1964-1965 Compilation), reprinted in 18 U.S.C. § 201 at 1025-27 (1976).

The Post first submitted a FOIA request for the Forms HHS-474 completed by NCI consultants on February 14, 1980. Despite the auspicious overtones of the date, however, this was destined to be no sweetheart deal. Initially spuried by HHS, the Post filed suit in the district court seeking to compel disclosure of the forms.

In its first pass on this case, the district court found that FOIA exemption 4, see 5 U.S.C. § 552(b)(4) (covering commercial or financial materials that are "obtained from a person" and are "privileged or confidential"), did not exempt Form HHS-474 from disclosure, because the forms did not contain "financial" information. The court further held, however, that the forms [**4] were shielded by exemption 6, see 5 U.S.C. § 552(b)(6) (permitting withholding of "personnel and medical files and similar files" whose disclosure would be "a clearly unwarranted invasion of personal privacy").

On appeal, the case was reversed and remanded to the district court. See Washington Post Co. v. HHS, 223 U.S. App. D.C. 139, 690 F.2d 252 (D.C. Cir. 1982) (Post v. HHS I). We held that the consultants' exemption 6 privacy interests were minimal in comparison to the public's "singularly strong interest in disclosure of consultants' conflicts of interest." Id. at 264. We went on to conclude, however, that Form HHS-474 did contain "financial" information as that term is used in exemption 4. Id. at 266. We also noted that HHS had not contended that the form should be withheld as "privileged," but that it was still an open question whether the information should be deemed "confidential." In particular, ve cited "the possibility that part-time consultants may construe Form 474's disclosure requirement narrowly and thus nay not disclose all possible conflicts of interest." Id. at 269. Were this a likely result, [**5] exemption 4 might come into play on the ground that disclosure would "impair the Government's ability to obtain necessary information in

the future." National Parks & Conservation Ass'n v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted) (National Parks I). However, the only evidence before the court on the first appeal was a single conclusory affidavit from Robert Eaglesome, Director of Personnel Policy for HHS, in which he stated his "professional opinion" that disclosure "would impair the Department's ability to obtain candid and accurate information in the future." 690 F.2d at 257. We therefore remanded the case to the district court "to give the government an opport inity to provide the detailed factual justification for withholding" that this court had earlier required in an exemption 4 inquiry. Post v. HHS I, 690 F.2d at 269 (citing Pacific Architects & Engineers, Inc. v. Renegotiation Board, 164 U.S. App. D.C. 276, 505 F.2d 383, 385 (D.C. Cir. 1974)).

- 2 The other prong of the exemption 4 test announced in National Parks I, whether disclosure is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained," 198 F.2d at 770, was found not to be in issue in this case. Post v. HHS I, 690 F.2d at 268.
- [**6] On the second round before the district court, the government pursued an argument that it had not previously raised before that court or in the first appeal: i.e., that because the Forms HHS-474 had been [*323] held privileged in the context of civil discovery, they could also be withheld under the "privileged" arm of exemption 4. The district court agreed, relying on United States v. Weber Aircraft Corp., 465 U.S. 792, 79 L. Ed. 2d 814, 104 S. Ct. 1488 (1984), and again granted the government's motion for summary judgment. See Washington Post Co. v. HHS, 603 F. Supp. 235 (D.D.C. 1985). On appeal, this court again reversed, finding unjustified "HHS's tardy assertion of its exe nption 4 'privilege' defense." Washington Post Co. v. HHS 254 U.S. App. D.C. 160, 795 F.2d 205, 208 (D.C. Cir. 1986) (Post v. HHS II). We again remanded the case, this time "with instructions to determine whether the Forms 474 con ain information that is 'confidential' under exemption 4." Id. at 209.

That detour over, we come at last to the decision now under review. Confronting the case on a second rebound, the district court [**7] agreed at the outset that "the only issue left for discussion . . . is whether disclosure is likely to impair the government's ability to obtain similar information in the future." Washington Post Co. v. HHS, Civ. No. 80-01681, mem. op. ("Mem. Op.") at 3 (D.D.C. Nov. 20, 1987) (Joint Appendix ("J.A.") at 59). The court explained (as we had observed in Post v. HHS I) that conceivably

because Form 474 leaves room for interpretation of which financial interests "relate directly or indirectly to [the individual's] consultancy duties," part-time consultants might construe that instruction narrowly and thus fail to disclose all possible conflicts of interest. Should such selective reporting occur, the government's access to full and accurate information would be impaired.

Mem. Op. at 4 (J.A. at 60). The record before the district court contained affidavits from various officials at NCl, NIH, and HHS, see J.A. at 73-76, 79-149, expressing concern that this consequence might follow disclosure of the forms? Noting that such a result was inevitably "speculative," the court nevertheless concluded that "the arguments advanced by the government are sufficient [**8] to support a finding of potential impairment." Mem. Op. at 6 (J.A. at 62).

3 For example, Vincent T. DeVita, Jr., Director of the NCI, stated in his affidavit, "I am convinced that public availability of [Form HHS-474] can only adversely affect the peer review system by . . . (3) impairing the completeness and accuracy of the information on the form." J.A. at 130.

Despite its observation that the impairment issue was the only question left in the case, the district court proceeded to entertain the government's separate contention that qualified individuals might forego participation in the peer review process altogether if their listing of financial interests were made publicly available. The government offered as proof of this recruitment aspect the results of an informal survey it had conducted suggesting that of the 49 NCl consultants (out of a total of 467) who had reported at least one financial interest on the relevant portion of Form HHS-474, five would decline to participate in the future if the [**9] forms were publicly disclosed, and an additional five had a "clear objection to disclosure," but would still accept future service. J.A. at 144-49 (Affidavit of William A. Walter, Deputy Director, NCl). The district court correctly recognized that this information was irrelevant to the question of "impairment"-that is, to whether those scientists who do become involved with NCl committees will narrowly construe the financial disclosure requests. However, citing language from Post v. HHS I, ' the district court proceeded to reinject the potential risk of nonparticipation into the inquiry by considering it in the "balancing procedure" that it thought to be proper under the exemption 4 "confidentiality" analysis. Mem. Op. at 8 (J.A. at 64)."

- 4 See 690 F.2d at 269 (noting that the exemption 4 confidentiality inquiry "necessarily involves a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure," but declining to "decide... the details of the balancing process").
- The district court also determined that its decision to guard the forms' confidentiality was "bolstered by provisions of the Ethics in Government Act, 5 U.S.C. sections 201 et seq." Id. at 9-10 (J.A. at 65-66). However, as we noted in Post v. HHS I, the disclosure exemption contained in that Act for part-time government employees was not probative of a congressional desire to exempt NCI consultants from all disclosure requirements. "Thus, we [gave] greater weight to the Act's primary purpose to require public disclosure of conflicts of interest than to the narrow and unexplained exception for employees who work 60 days or less per year." 690 F.2d at 265 & n.46. The government apparently concedes this much by declining to defend the district court's reliance on this

HHS does contend, however, that a different part of the Ethics in Government Act, 5 U.S.C. App. § 207 (Supp. IV 1986), supports the district court's decision here. That section, passed as an amendment to the Ethics in Government Act in 1985, authorizes the President to require executive branch employees to file financial disclosure reports that will remain confidential. This the President did in Executive Order 12,565, reprinted in 51 Fed. Reg. 34,437 (Sept. 29, 1986), which creates a "Comprehensive System of Financial Reporting" requiring confidential reports "by those employees whose positions have been designated for this purpose pursuant to section 404 of this Part." Section 1 (emphasis added). Section 404 in turn requires the Office of Government Ethics to oversee the "designat[ion] [of] the positions for which non-public (confidential) reports will be required." However determinative these new provisions will be if and/or when Form HHS-474 is brought within their purview through official "designation," HHS concedes that the form has not yet been so designated and it appears therefore that the provisions by their own terms do not apply. Moreover, the government failed to raise this argument in the district court. The amendment was passed in 1985, prior to the remand in Post v. HHS II. Thus we need not and do not pass on the relationship of the new legislation to the application of exemption 4 in this case.

[**10] [*324] On the basis of this reasoning, the district court settled what it termed the "close question" whether the information at issue qualifies under FOIA exemption 4 as confidential by deciding, again on a motion for summary judgment, that it does so qualify. The court expressly found "that the extent of the government's impairment and the importance of the information outweigh the public interest in disclosure." Mem. Op. at 10-11 (J.A. at 66-67). ernment's motion for summary judgment:

Resolution of this dispute involves an analysis of the potential, hypothetical impairment the government might suffer should the requested documents be made available to the public. Due to the nature of the inquiry, there is no definitive proof that may be adduced by either side in support of their respective contentions. At best, the parties may provide the Court with speculation from individuals who speak with varying degrees of authority.

Washington Post Co. v. HHS, Civ. No. 80-01681, mem. and order at 1-2 (D.D.C. Jan. 14, 1988) (J.A. at 69-70). The [**1] Post shortly thereafter filed this appeal.

II. ANALYSIS

[HN1] FOIA exemption 4 authorizes withholding "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b)(4). Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute. See Department of Justice v. Julian, 486 U.S. 1, 108 S. Ct. 1606 1611, 100 L. Ed. 2d 1 (1988). It is now conceded that the information contained in Form HHS-474 is "financial" in nature, and that it is "obtained from a person." Moreover, the question of "privilege" was removed from this case in Post v. HHS II. The only issue remaining in the case is thus whether the requested information is "confidential" within the meaning of the exemption.

Under the current standard in this circuit, [HN2] commercial or financial information is "confidential" under exempt on 4 if disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks 1, 498 F.2d at 770 [**12] (footnote omitted). Because there is no contention that disclosure of Form

HHS-474 would cause any competitive harm, the only inquiry properly before the district court was the question whether disclosure of the financial information contained in Form HHS-474 would be likely to impair the government's ability to gather this information [*325] in the future, and if so whether this risk outweighed the public's interest in disclosure.

A. Summary Judgment

- Fed. R. Civ. P. 56 [HN3] authorizes a district court to grant summary judgment when it can be shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sun mary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could not re urn a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. C. 2505 (1986). In deciding a motion for summary judgment, the district court is obliged to view the available evidence in the light most favorable to the nonmoving party. Adickes v. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); [**13] Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Securities Co., 243 U.S. App. D.C. 43, 751 F.2d 1262, 1263 (D.C. Cir. 1985) ("Any doubt is to be resolved against the moving party."). The Supreme Court has recently made clear that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. If a genuine dispute does exist over a material issue, then parties should be given the opportunity to prosent direct evidence and cross-examine the evidence of their opponents in an adversarial setting. See Washington Post Co. v. United States Dep't of State, 268 U.S. App. D.C. 146, 840 F.2d 26, 30-31 (D.C. Cir. 1988) (Post v. Department of State), explaining that "this limitation on the use of summary judgment is not a mere technicality. The integrity of t court's de novo [FOIA] judgment rests upon an adversarial system of testing for truth when critical adjudicative facts are subjects of a contest." (footnote omitted)). 'Moreover, our previous cases have made it abundantly [**14] cle: r that [HN4] these general standards under rule 56 apply with equal force in the FOIA context. See, e.g., id. at 29-31: Greenberg v. FDA, 256 U.S. App. D.C. 135, 803 F.2d 1213 (D.C. Cir. 1986); Sears, Roebuck & Co. v. GSA, 180 U.S. App. D.C. 202, 553 F.2d 1378 (D.C. Cir.), cert. denied, 434 U.S. 826, 54 L. Ed. 2d 84, 98 S. Ct. 74 (1977).
 - A petition for rehearing with a suggestion for rehearing en bane is currently pending in this court challenging the panel's disposition of certain issues in Post v. Department of State. The issues raised by the State Department in its petition include the level of deference that this court should accord to the Department's view: regarding predictions involving foreign affairs and national security. The State Department has also presented the question whether and how courts should weigh the public interest in disclosure against the privacy interests protected by FOIA exemption 6, 5 U.S.C. § 552(b)(6). (This latter inquiry is presented in a case that is pending before the Supreme Court, see Reporters Committee for Freedom of the Press v. United States Dep't of Justice, 265 U.S. App. D.C. 365, 831 F.2d 1124 (D.C. Cir. 1987) (on rehearing), cert. granted, 485 U.S. 1005, 108 S. Ct. 1467, 99 L. Ed. 2d 697 (1988).) These challenges leave intact, however, the panel's more general discussion of the role of summary judgment in FOIA cases.
- [**15] From the record before us, it is quite clear that a substantial, "genuine" dispute remains over the critical factual issue in this case whether public disclosure would cause individuals to so narrowly construe the requests for information in Form HHS-474 that the government's information-gathering ability would be seriously impaired. While the government has offered several affidavits tending to support the notion that this impairment would result, these statements are vigorously contested by the Post's (similarly terse) affidavits in response. For example: "Public disclosure, if anything, would have the effect of ensuring a more complete response because people would want to [*325] avoid the risks and embarrassment of being thought not to have fully disclosed." J.A. at 184 (Affidavit of Nicholas A. Ashford, Director of the Center for Policy Alternatives, Associate Professor of Technology and Policy in the School of Engineering at Massachusetts Institute of Technology, and former consultant on several NCI peer review panels). It a similar vein, Dr. J.R. Heller, Jr., a former Director and subsequently a Special Assistant to the Director of the NCI, stated that "the fact [**16] that NCI advisors must complete Form 474 to be eligible for service, if combined with knowledge on their part that the forms will be publicly available, will have a beneficial effect on ensuring that related financial interests are fully disclosed." J.A. at 187.
 - 7 We note with some dismay that the purpose of our original remand in Post v. HHS I was to "give the gcv-ernment an opportunity to provide the detailed factual justification for withholding under Exemption 4," 69:1 F.2d at 269, but the only pertinent change in the record since then is that Robert Eaglesome's original conclusory affidavit, J.A. at 73, has been joined by four equally conclusory affidavits. See Affidavits of William F. Raub,

J.A. at 79; Vincent T. DeVita, Jr., J.A. at 127; James B. Wyngaarden, J.A. at 133; and Edward N. Brandt, Jr., J.A. at 138. In effect, we asked the government to change the station, and they responded by turning up the volume.

'While the district court may of course ultimately determine that the [**17] Post's authorities are less believable than he NCl's, it is impermissible to conclude at this stage that no reasonable factfinder could be persuaded by the Post': evidence. As this court explained in Sears, Roebuck & Co.,

[HN5] Where there is a conflict in the affidavits as to what adverse consequences will flow from the revelation of the facts contained in the documents sought to be disclosed, then it appears that there is indeed a conflict regarding very material facts which calls for some type of adversary procedure.

553 F.2d at 1382. In this case, however, rather than giving the Post the benefits of any doubts raised by the factual dispute aised in the affidavits, the district court appears to have decided the summary judgment motion by settling this "close question," Mem. Op. at 10 (J.A. at 66), against the nonmoving party.

- 8 Ironically, HHS's only real argument in support of the district court's decision to grant summary judgment collapses back in on itself: HHS attacks the Post's affiants by challenging the weight their testimony should be accorded. See Brief for Appellee at 19-20. But the need to assess the credibility of witnesses is precisely what places this dispute outside the proper realm of summary judgment.
- [**18] The district court defended its decision by noting that the "factual" inquiry into impairment required an inher intly speculative finding, suggesting that it was therefore justified in cutting off both sides' ability to present probative evidence and to cross-examine each other. In so doing, we think the court short-circuited the factfinding process. "Factual" issues like those presented here are rarely susceptible to definitive proof. Rather, "factual" issues that involve predictive facts almost always require a court to survey the available evidence, to credit certain pieces of evidence above others, and to draw cumulative inferences until it reaches a judgmental conclusion. In the end, the court makes its best assessment about what is most likely to happen in the future. In such an inquiry, the ultimate "facts" in dispute are most successfully approached when all relevant evidentiary underpinnings are fully developed. See generally Sears, Roeb ick & Co., 553 F.2d at 1382-83.

Of course, the type and quantity of evidence that is necessary to enable courts to make these factual assessments varie: from case to case. Even in this case, the parties may become convinced [**19] that a full-scale battle of experts on the issue of impairment would not be in either side's interest. If that is so, they could submit the case for decision on the besis of a stipulated evidentiary record. But at this stage, on this record, it is clear that there is a genuinely controverted factual issue in the case which is not ripe for disposition by summary judgment. To resolve this case the judge must pick and choose between competing experts' affidavits as to the effect of disclosure on the likelihood of eliciting complete responses to the questions. The case is therefore remanded to enable both sides to address and contest the issue o 'impairment, in order to provide the district court with a record on which to decide the crucial issue.

E., The Exemption 4 Balance

On remand, if the district court ultimately finds that disclosure will impair the government's information-gathering, it will once again be required to conduct the "rough balancing of the extent of impairment [*327] and the importance of the information against the public interest in disclosure." Past v. HHS I, 690 F.2d at 269. In performing that balance, we caution that in [**20] this case, there is no longer any room on the scales for weighing the possibility that public disclosure of Form HHS-474 will cause some scientists to decline service on the NCI's peer review committees altogethe. Whatever validity this contention of "nonparticipation" might have had at the start of this litigation (or would have f similar litigation were commenced in the future), for the purpose of this action the issue of nonparticipation was waived by the government when it abandoned the claim before this court in Past v. HHS I. See 690 F.2d at 268 n.51 (noting that it was not necessary to address the government's need to attract qualified scientists because "the government did not ask us in this case to consider including that specific interest in the National Parks I test"). Nothing appears in the record or in the arguments before this court to justify excusing the government from the general rule that [HN6] a party cannot raise anew on remand an issue that it failed to pursue in the appeal."

9 The government contends that because the recruitment issue has consistently been raised before the district court and was never "affirmative[ly] abandon[ed]" before this court, the district court was correct in considering the evidence regarding the risk of nonparticipation by scientists. See Brief for Appellee at 15. The government further argues that no policy would be served by a finding that the recruitment claim was abandoned in this case, because the Post has always been aware of the government's contention that public disclosure might cause scientists not to serve as consultants. But the whole point of the rule regarding abandonment of claims is to require that all viable arguments be vigorously pursued throughout the proceedings, thereby allowing for earlier decision, rather than permitting parties to pick and choose which claims will be presented on appeal and which will be held back until a later time. In this case, the government had an opportunity to raise the recruitment issue in Post v. HHS I and it failed to do so. The fact that the Post was made aware of the claim at the first appearance before the district court does not change the situation: we held then and we reaffirm now that the only issue before the district court on remand from Post v. HHS I was "the factual determination of whether release of this information is likely to impair the government's ability to obtain similar information in the future." 690 F.2d at 255.

At oral argument, the government further sought to justify its failure to pursue the recruitment claim by noting that it was not as clear six years ago as it is today that factors beyond the two announced in National Parks I could be considered under exemption 4 "confidentiality" analysis. The government's contention is undercut, however, by the fact that it did present this claim to the district court in 1980.

[**21] Moreover, the district court may not, as it did below, inject the risk of future scientist nonparticipatio 1 in NCI programs into the balancing process on the public interest side when the government is barred from pursuing it on the impairment side. [HN7] When we refer to a "rough balancing" under exemption 4, we mean that information will be withheld only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in National Parks I (and its progeny) militating against disclosure on the other side. More simply put, "minor" disady: mtages flowing from disclosure "cannot overcome the disclosure mandate of FOIA." Post v. HHS I, 690 F.2d at 269. When we first announced the test for exemption 4 confidentiality in National Parks I, we attempted to capture in two inquiries (serious competitive harm and impairment of government information-gathering) the most obvious interests that Congress was seeking to protect in the exemption, while expressly reserving the question "whether other governmental interests are embodied in this exemption." 498 F.2d at 770 n.17. In Critical Mass Energy Project v. NRC, 265 U.S. App. D.C. 130, 830 F.2d 278 (D.C. Cir. 1987), [**22] we subsequently found that other interests may indeed be considered under exemption 4. Yet we think a fair reading of our cases makes it clear that other interests can be int oduced into the balance only as factors weighing against disclosure, in a manner similar to the two interests identified in National Parks I. All of these factors, alone or in combination, are negative interests properly weighed against the strong public interest in disclosure that permeates FOIA. The district court, however, allowed the risk of future scientist [*328] nonparticipation to diminish the overall public interest in disclosure that would be balanced against the negative factors. Such an approach could not have been intended by the drafters of exemption 4 for it would allow courts to count anti-disclosure factors on both sides of the scale, adding weight to the impairment side and reducing the weight on the disclosure side. The thrust of FOIA is distinctly in the opposite direction, and exemption 4 contemplates a straightforward balance of the pros and the cons of disclosure in any particular case.

III. CONCLUSION

For the reasons stated, we vacate the district court's order directing [**23] summary judgment for HHS. The saue of whether disclosure of the financial information contained in Form HHS-474 would seriously impair the government's ability to gather the information it needs from participating scientists in the future is a disputed factual issue that does not lend itself to disposition by means of summary judgment on the present record. Reluctantly we return this case once more to the district court for further proceedings consistent with this opinion.

So ordered.

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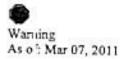
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LEXSEE 432 U.S. 333



HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. v. WASHINGTON STATE APPLE ADVERTISING COMMISSION

No. 76-63

SUPREME COURT OF THE UNITED STATES

432 U.S. 333; 97 S. Ct. 2434; 53 L. Ed. 2d 383; 1977 U.S. LEXIS 123

Argued February 22, 1977 June 20, 1977; as amended

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee state apple advertising commission brought an action challenging the constitutiona ity under the Commerce Clause of appellant state's statute prohibiting closed containers of apples shipped into the state from bearing any grade other than the applicable United States grade. The United States District Court for the Eastern District of North Carolina invalidated the statute and granted injunctive relief. Appellant sought review.

OVERVIEW: Appellant state enacted N.C. Gen. Stat. § 106-189.1, prohibiting closed containers of apples shipped into the state from displaying state grades or classifications. Appellee sued, asserting that the statute violated the Commerce Clau: e and seeking injunctive relief from its enforcement. The district court granted the requested relief. On review, the Cour affirmed. It held that appellee had standing to sue because it performed the functions of a traditional trade association representing the state apple industry. The Court also held that the jurisdictional amount in controversy of 28 U.S.C.S. § 1331 was met, because appellee's substantial volume of sales and the continuing nature of the statute's impact on sales precluded a finding to a legal certainty that its losses and expenses would not total the requisite \$ 10,000. The Court finally held that the statute both burdened and discriminated against the interstate sale of apples and that appellant did not meet the burden of demonstrating substantial local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve local interests.

OUT COME: The Court affirmed, It held that appellee had standing to challenge the statute, that the jurisdictional amount in controversy requirement was met, and that the challenged statute burdened and discriminated against interstate tales of apples from appellee; appellant failed to sustain its burden of showing substantial local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives.

Lexis Nexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy [HN1] See 28 U.S.C.S. § 1331(a).

Governments > Agriculture & Food > Product Quality [HN2] See N.C. Gen. Stat. § 106-189.1 (1973).

Civil Procedure > Justiciability > Standing > General Overview

Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview

[HN3] An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy

[HN4] In actions seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > General Overview

Governments > State & Territorial Governments > Police Power

Transportation Law > Interstate Commerce > State Powers

[HN5] In the absence of conflicting legislation by Congress, there is a residuum of power in the states to make law: governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to som: extent, regulate it. That residuum is particularly strong when a state acts to protect its citizenry in matters pertaining to the sale of foodstuffs. However, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national "common market," a court is confronted with the task of effecting an accommodation of the competing national and local interests.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview Evidence > Procedural Considerations > Burdens of Proof > General Overview

[HN6] When discrimination against interstate commerce by a state statute is demonstrated, the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.

SUMMARY:

A Washington state agency, created by statute for the promotion and protection of the Washington state apple industry and composed of several state apple growers and dealers chosen from electoral districts by their fellow growers
and dealers, all of whom by mandatory assessments finance the agency's operations, brought an action for declaratery
and injunctive relief in the United States District Court for the Eastern District of North Carolina, challenging the constitutionality of a North Carolina statute requiring that all closed containers of apples sold in the state or shipped into the
state bear no grade for apples other than the applicable federal grade or the designation "unclassified," "not graded," or
"grade not determined." The three-judge District Court issued a permanent injunction against enforcement of the North
Carolina statute, holding that (1) the Washington agency had standing to challenge the statute both in its own right and
on behalf of its constituents, (2) the \$ 10,000 amount in controversy requirement of 28 USCS 1331 had been satisfied,
and (3) the statute unconstitutionally discriminated against commerce, insofar as it affected the interstate shipment of
Washington apples (408 F Supp 857).

On direct appeal, the United States Supreme Court affirmed. In an opinion by Burger, Ch. J., expressing the unanimous view of the eight participating members of the court, it was held that (1) the Washington statutory agency had

stancing to bring the action in a representational capacity on behalf of its constituents, notwithstanding the agency's lack of str tus as a traditional voluntary membership trade association, where (a) the injuries suffered by the agency's constituents as a result of the North Carolina statute-such statute having caused some Washington apple growers and dealers to obliterate Washington grades from the large volume of containers sent to North Carolina at a cost of from five to fifteen :ents per carton, to abandon the use of preprinted containers, diminishing the efficiency of their marketing operations and to lose accounts in North Carolina-were direct and sufficient to establish the requisite case or controversy betw en the agency's constituents and the defendants, (b) the agency's attempt to remedy such injuries and to secure the Washington apple industry's right to publicize its grading system was central to the agency's purpose of protecting and enha icing the market for Washington apples, and (c) neither the interstate commerce claim nor the declaratory and injunctive relief requested in the action required individualized proofs, (2) the \$ 10,000 jurisdictional amount in controversy requirement of 28 USCS 1331 was met, since, in view of the substantial volume of apple sales in North Carolina and the continuing nature of the statute's interference with the business affairs of the agency's constituents, it could not be said to a legal certainty that such losses and expenses would not, over time if they had not already done so, amount to the requisite \$ 10,000 for at least some of the individual growers and dealers represented by the agency, and (3) the North Carolina statute constituted an unconstitutional burden on interstate commerce under the commerce clause of the Constitution (Art I, 8, cl 3), since it had the practical effect of not only burdening the interstate sales of Washington apples, but also discriminating against such sales, and North Carolina had failed to sustain its burden of justifying the discrimination against commerce in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve local interests.

Rehnquist, J., did not participate.

LAV'YERS' EDITION HEADNOTES:

[***LEdHN11

COURTS §236.5

PARTIES \$23

standing -- state statutory agency representing constituency --

Headnote:[1A][1B]

In a federal court action challenging, as unconstitutional under the commerce clause of the Constitution (Art I, 8, cl 3), a state statute requiring that all closed containers of apples sold in or shipped into the legislating state bear no grade for apples other than the applicable federal grade or a designation that the apples are ungraded, which action is brought by ar apple producing state's agency, created by statute to promote and protect that state's apple industry and composed of a 1 umber of state apple growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whor 1 by mandatory assessment finance the agency's operations, such agency has standing to bring the action in a representational capacity on behalf of its constituents, notwithstanding the agency's lack of status as a traditional voluntary membership trade association, where (1) the injuries suffered by the state agency's constituent apple producers as a result of the challenged statute-such statute having caused some constituent growers and dealers to obliterate their own state': grades from the large volume of containers sent into the legislating state at a cost of from five to fifteen cents per carto 1, to abandon the use of preprinted containers, diminishing the efficiency of their marketing operations, and to lose accounts in the legislating state-are direct and sufficient to establish the requisite "case or controversy" between the agency's constituents and the defendants in the action, (2) the state agency's attempt to remedy such injuries and to secure he right of its state's apple industry to publicize its grading system is central to the agency's purpose of protecting and enhancing the market for the apples of its constituents, and (3) neither the interstate commerce claim nor the declarator; and injunctive relief requested in the action requires individualized proofs.

[***LEdHN2]

COURTS §427

jurisdictional amount in controversy requirement -- declaratory and injunctive relief -- statute governing carton mark ngs --

Headnote:[2A][2B]

In a federal court action seeking declaratory and injunctive relief with respect to an alleged unconstitutional strict statute requiring that all closed containers of apples sold in or shipped into the legislating state bear no grade for apples other than the applicable federal grade or a designation that the apples are ungraded, which action is brought by an apple producing state's statutory agency as representative of apple growers and dealers in the state forming the agency's constituency, the S 10,000 jurisdictional amount in controversy requirement of 28 USCS 1331 is met, since, in view of the substantial volume of sales in the legislating state, amounting to an excess of S 2 million in one year alone, and the continuing nature of the statute's interference with the business affairs of the agency's constituents, it cannot be said to a legal certainty that such losses and expenses would not, over time if they had not already done so, amount to the requisite \$ 10,000 for at least some of the individual growers and dealers represented by the agency.

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[***LEdHN3]
COMMERCE §200
grade labeling on apple containers -- state statute -- discrimination -- justification --
Headnote:[3A][3B]
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A state statute requiring that all closed containers of apples sold in or shipped into the legislating state bear no grade for apples other than the applicable federal grade, or a designation that the apples are not graded, constitutes in unconstitutional burden on interstate commerce under the commerce clause of the United States Constitution (Art 1, 8, cl 3), since the statute has the practical effect of not only burdening interstate sales of the apples of another state having strict requirements for grading apples produced in such other state and shipped in interstate commerce, but also dis-riminates against sales of such other state's apples, and the discrimination against commerce is not justifiable in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve local interests.

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[***LEdHN4]

PARTIES §23

standing of association -- action on behalf of members --

Headnote:[4]
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An association has standing to bring suit on behalf of its members when: (1) its members would otherwise hav: standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

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[***LEdHN5]

COURTS §427

jurisdictional amount -- suit by state agency -- reliance upon constituents --

Headnote:[5]
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A state's agency created by statute for the promotion and protection of the state's apple industry, which agency is composed of a number of state growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessment finance the agency's operations, may rely upon its constituents to meet the \$ 10,000 amount in controversy requirement of 28 USCS 1331 in its federal court action brought to obtain declarator and injunctive relief with respect to another state's alleged unconstitutional statute governing apple grade markings on closed containers of apples.

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[***LEdHN6]

COURTS §427

jurisdictional amount -- declaratory or injunctive relief action --

Headnote:[6]
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In actions seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation.

[***LEdHN7]

COURTS §427

njunctive and declaratory relief -- jurisdictional amount -- measurement --

-leadnote:[7]

Whether the \$ 10,000 amount in controversy requirement of 28 USCS 1331 is met in a federal court action brought by a state statutory agency representing the state's apple growers and dealers—which action is brought to obtain declaratory and injunctive relief with regard to another state's alleged unconstitutional law governing the apple grade markings on closed containers of apples sold in or shipped into the legislating state—is determined by the value of the right of individual apple growers and dealers represented by the agency to conduct their business affairs in the legislating state free from the interference of the challenged statute; the value of such growers' and dealers' right is measured by the losses that will follow from enforcement of the legislating state's statute, and, in such regard, a proper matter for consideration is the cost incurred by the growers and dealers in complying with the statute.

[** LEdHN8]

COMMERCE \$100

-sommerce clause -- exercise of state authority -- state powers -- sale of food --

feadnote:[8]

Not every exercise of state authority imposing some burden on the free flow of commerce is invalid; although the commerce clause of the United States Constitution (Art I, 8, cl 3) acts as a limitation upon state power even without congressional implementation, in the absence of conflicting legislation by Congress, there is a residium of powers in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it, such residium being particularly strong when the state acts to protect its citizenry in matters pertaining to the sale of foodstuffs.

[* * LEdHN9]

COMMERCE §148

'alidity of state regulation - test -

leadnote:[9]

When state legislation furthering matters of legitimate local concern comes into conflict with the overriding requirement, under the commerce clause of the United States Constitution (Art I, 8, cl 3), of a national common market, an accommodation of the competing national and local interests must be effected.

[*** LEdHN10]

COMMERCE §152

discrimination -- interstate sales -- state justification --

Headnote:[10]

'When it is demonstrated that a state statute discriminates against interstate sales, the burden falls on the state to justify such discrimination against commerce both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake.

SYLLABUS

Appellee, a statutory agency for the promotion and protection of the Washington State apple industry and composed of 13 state growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom

by mandatory assessments finance appellee's operations, brought this suit challenging the constitutionality of a Nor h Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by no grade on the containers other than the applicable federal grade or a designation that the apples are not graded. A three-judge District Court granted the requested injunctive and declaratory relief, holding that appellee had standing to challenge the statute, that the \$ 10,000 jurisdictional amount of 28 U.S.C. § 1331 was satisfied, and that the challenged statute unconstitutionally discriminated against commerce insofar as it affected the interstate shipment of Washington apples. Held:

- 1. Appellee has standing to bring this action in a representational capacity. Pp. 341-345.
- (a) An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. Warth v. Seldin, 422 U.S. 490. Pp. 342-343.
- (b) The prerequisites to associational standing described in Warth are clearly present here: (1) At the risk of cherwise losing North Carolina accounts, some Washington apple growers and dealers had (at a per-container cost of 5 cents to 15 cents) obliterated Washington State grades from the large volume of North Carolina-bound containers; and they had stopped using preprinted containers, thus diminishing the efficiency of their marketing operations; (2) appellee's attempt to remedy these injuries is central to its purpose of protecting and enhancing the Washington apple mirket; and (3) neither appellee's constitutional claim nor the relief requested requires individualized proof. Pp. 343-344.
- (c) Though appellee is a state agency, it is not on that account precluded from asserting the claims of the State's apple growers and dealers since for all practical purposes appellee performs the functions of a traditional trade association. While the apple growers are not "members" of appellee in the traditional trade association sense, they possess all the indicia of organization membership (viz., electing the members, being the only ones to serve on the Commission, and financing its activities), and it is of no consequence that membership assessments are mandatory. Pp. 344-345.
- (d) Appellee's own interests may be adversely affected by the outcome of this litigation, since the annual asses :ments that are used to support its activities and which are tied to the production of Washington apples could be reduced if the market for those apples declines as a result of the North Carolina statute. P. 345.
- 2. The requirements of § 1331 are satisfied. Since appellee has standing to litigate its constituents' claims, it may rely on them to meet the requisite amount of \$ 10,000 in controversy. And it does not appear "to a legal certainty" that the claims of at least some of the individual growers and dealers will not come to that amount in view of the substantial annual sales volume of Washington apples in North Carolina (over \$2 million) and the continuing nature of the statute's interference with the Washington apple industry, coupled with the evidence in the record that growers and dealers have suffered and will continue to suffer losses of various types from the operation of the challenged statute, St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283. Pp. 346-348.
- The North Carolina statute violates the Commerce Clause by burdening and discriminating against the interstate sale of Washington apples. Pp. 348-354.
- (a) The statute raises the costs of doing business in the North Carolina market for Washington growers and dealers while leaving unaffected their North Carolina counterparts, who were still free to market apples under the federal g ade or none at all. Pp. 350-351.
- (b) The statute strips the Washington apple industry of the competitive and economic advantages it has earned for itself by an expensive, stringent mandatory state inspection and grading system that exceeds federal requirements. By requiring Washington apples to be sold under the inferior grades of their federal counterparts, the North Carolina statute offers the North Carolina apple industry the very sort of protection against out-of-state competition that the Commerce Clause was designed to prohibit. Pp. 351-352.
- (c) Even if the statute was not intended to be discriminatory and was enacted for the declared purpose of protesting consumers from deception and fraud because of the multiplicity of state grades, the statute does remarkably little to further that goal, at least with respect to Washington apples and grades, for it permits marketing of apples in closed containers under no grades at all and does nothing to purify the flow of information at the retail level. Moreover, Wishington grades could not have led to the type of deception at which the statute was assertedly aimed, since those grades equal or surpass the comparable federal standards. Pp. 352-354.

d) Nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. P. 354, 408 F.Supp. 857, affirmed.

3URGER, C.J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the case.

COUNSEL: John R. Jordan, Jr., argued the cause for appellants. With him on the brief were Rufus L. Edmisten, Attorney General of North Carolina, and Millard R. Rich, Jr., Deputy Attorney General.

Slad: Gorton, Attorney General of Washington, argued the cause for appellee. With him on the brief were Edward B. Macrie, Deputy Attorney General, and James Arneil, Special Assistant Attorney General.

JUDGES: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Stevens; Rehnquist took no part in the consideration or decision of the case.

OPINION BY: BURGER

OPUNION

[*335] [***389] [**2437] MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In 1973, North Carolina enacted a statute which required, inter alia, all closed containers of apples sold, offered for sale, or shipped into the State to bear "no grade other than the applicable U.S. grade or standard." N.C.Gen. Stat. § 106-89.1 (1973). In an action brought by the Washington State Apple Advertising Commission, a three-judge Federal District Court invalidated the statute insofar as it prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce.

[*336] [**2438] [***LEdHR1A] [1A] [***LEdHR2A] [2A] [***LEdHR3A] [3A] The specific questions presented on appeal are (a) whether the Commission had standing to bring this action; (b) if so, whether it satisfied the jurist ictional amount requirement of 28 U.S.C. § 1331; 'and (c) whether the challenged North Carolina statute constitutes an unconstitutional burden on interestate commerce.

1 Section 1331 provides in pertinent part:

[HN1] "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$ 10,000, exclusive of interest and costs...."

(1)

"Vashington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples (rown domestically and [***390] nearly half of all apples shipped in closed containers in interstate commerce. As might be expected, the production and sale of apples on this scale is a multimillion dollar enterprise which plays a signi leant role in Washington's economy. Because of the importance of the apple industry to the State, its legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent, mandatory inspect on program, administered by the State's Department of Agriculture, which requires all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. In all cases, the Washington State grades, which have gained substantial acceptance in the trade, are the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture (USDA). Compliance with the Washington inspection scheme costs the State's growers approximately \$ 1 million each year.

In addition to the inspection program, the state legislature has sought to enhance the market for Washington apples through the creation of a state agency, the Washington State Apple Advertising Commission, charged with the statutory [*331] duty of promoting and protecting the State's apple industry. The Commission itself is composed of 13 Washington apple growers and dealers who are nominated and elected within electoral districts by their fellow growers and dealers. Wash. Rev. Code §§ 15.24.020, 15.24.030 (1974). Among its activities are the promotion of Washington apples in both domestic and foreign markets through advertising, market research and analysis, and public education, as well its scientific research into the uses, development, and improvement of apples. Its activities are financed entirely by assessments levied upon the apple industry, § 15.24.100; in the year during which this litigation began, these assess-

ments totaled approximately \$1.75 million. The assessments, while initially fixed by statute, can be increased only upon the majority vote of the apple growers themselves. § 15.24.090.

In 1972, the North Carolina Board of Agriculture adopted an administrative regulation, unique in the 50 States which in effect required all closed containers of apples shipped into or sold in the State to display either the applicable USDA grade or a notice indicating no classification. State grades were expressly prohibited. 2 In addition to its 0> vious consequence -- prohibiting the display of Washington State apple grades on containers of apples shipped into North Carolina, the regulation presented the Washington apple industry with a marketing problem of potentially nationwide significance. Washington apple growers annually ship in commerce approximately 40 million closed cortainers of apples, nearly 500,000 of which eventually find their way into North Carolina, stamped with the applicable Washington State variety [*338] and grade. It is the industry's practice to [***391] purchase these containers preprinted with the various apple varieties [**2439] and grades, prior to harvest. After these containers are filled with apples of the appropriate type and grade, a substantial portion of them are placed in cold-storage warehouses where the grade labels identify the product and facilitate its handling. These apples are then shipped as needed throughout the year; after February 1 of each year, they constitute approximately two-thirds of all apples sold in fresh markets in this country. Since the ultimate destination of these apples is unknown at the time they are placed in storage, compliar ce with North Carolina's unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance. Alternatively, they could I ave changed their marketing practices to accommodate the needs of the North Carolina market, i.e., repack apples to be shipped to North Carolina in containers bearing only the USDA grade, and/or store the estimated portion of the har rest destined for that market in such special containers. As a last resort, they could discontinue the use of the preprinted containers entirely. None of these costly and less efficient options was very attractive to the industry. Moreover, in the event a number of other States followed North Carolina's lead, the resultant inability to display the Washington grades could force the Washington growers to abandon the State's expensive inspection and grading system which their customers had come to know and rely on over the 60-odd years of its existence.

2 The North Carolina regulation, as amended, provides in pertinent part:

"(6) Apple containers must show the applicable U.S. Grade on the principal display panel or marked Unclassified,' "Not Graded," or 'Grade Not Determined.' State grades shall not be shown." § 3-24.5(6), Rule:, Regulations, Definitions and Standards of the North Carolina Department of Agriculture.

With these problems confronting the industry, the Washington State Apple Advertising Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the display of state grades. An administrative hearing was held on the question but no relief was granted. [*339] Indeed, North Carolina hardened its position shortly thereafter by enacting the regulation into law: S

[HN2] "All apples sold, offered for sale or shipped into this State in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U.S. grade or standard or the marking 'unclassified,' 'not graded' or 'grade not determined."" N.C. Gen. Stat. § 106-189.1 (1973).I

Nontheless, the Commission once again requested an exemption which would have permitted the Washington apple growers to display both the United States and the Washington State grades on their shipments to North Carolina. This request, too, was denied.

Unsuccessful in its attempts to secure administrative relief, the Commission instituted this action challenging the constitutionality of the statute in the United States District Court for the Eastern District of North Carolina. Its complaint, which invoked the District Court's jurisdiction under 28 U.S.C. §§ 1331 and 1343, sought a declaration that the statute violated, inter alia, the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, insofar as it prohibited the display of Washington [***392] State grades, and prayed for a permanent injunction against its enforcement in this manner. A three-judge Federal District Court was convened pursuant to 28 U.S.C. §§ 2281 and 2284 to consider the Commission's constitutional attack on the statute.

3 Under Washington law, the Commission is a corporation and is specifically granted the power to sue ard be sued. Wash. Rev. Code § 15.24.070(8) (1974).

After a hearing, the District Court granted the requested relief. 408 F.Supp. 857 (1976). At the outset, it held 'hat the Commission had standing to challenge the statute both in its own right and on behalf of the Washington State g owers and dealers, and that the \$ 10,000 amount-in-controversy [*340] requirement of § 1331 had been satisfied. 438

F.Supp. at 858. [**2440] Proceeding to the merits, the District Court found that the North Carolina statute, while neutral on its face, actually discriminated against Washington State growers and dealers in favor of their local counterparts Id., at 860-861. This discrimination resulted from the fact that North Carolina, unlike Washington, had never established a grading and inspection system. Hence, the statute had no effect on the existing practices of North Carolina producers; they were still free to use the US DA grade or none at all. Washington growers and dealers, on the other hand were forced to alter their long-established procedures, at substantial cost, or abandon the North Carolina market. The District Court then concluded that this discrimination against out-of-state competitors was not justified by the asserted local interest - the elimination of deception and confusion from the marketplace - arguably furthered by the statute. Indeed, it noted that the statute was "irrationally" drawn to accomplish that alleged goal since it permitted the statute unconstitutionally discriminated against commerce, insofar as it affected the interstate shipment of Washington apples, and enjoined its application. This appeal followed and we postponed further consideration of the question of jurise iction to the hearing of the case on the [*341] merits sub nom. Holshouser v. Washington State Apple Advertising Comm'n, 429 U.S. 814 (1976).

- 4 In this regard, it adopted the ruling of the single District Judge who had previously denied appellants' motion to dismiss the complaint brought on the same grounds. App. 51-58. That judge had found it unnecessary to determine whether jurisdiction was also proper under 28 U.S.C. § 1343 in view of his determination that jurisdiction had been established under § 1331. App. 57 n.2.
- 5 As an alternative ground for its holding, the District Court found that the statute would have constituted an undue burden on commerce even if it had been neutral and nondiscriminatory in its impact. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). 408 F.Supp., at 862 n.9.

(2)

[***LEdHR1B] [1B]In this Court, as before, the North Carolina officials vigorously contest the Washington Commission's standing to prosecute this action, either in its own right, or on behalf of that State's apple industry which it purports to represent. At the outset, appellants maintain that the Commission lacks the "personal stake" in the outcome of this litigation essential to its invocation of federal-court jurisdiction. Baker v. Carr. 369 U.S. 186, 204 (1962). The Commission, they point out, is a state agency, not itself engaged in the [***393] production and sale of Washington apples or their shipment into North Carolina. Rather, its North Carolina activities are limited to the promotion of Wash ington apples in that market through advertising. Appellants contend that the challenged statute has no impact on that activity since it prohibits only the display of state apple grades on closed containers of apples. Indeed, since the statute imposed no restrictions on the advertisement of Washington apples or grades other than the labeling ban, which affects only those parties actually engaged in the apple trade, the Commission is said to be free to carry on the same activities that it engaged in prior to the regulatory program. Appellants therefore argue that the Commission suffers no injury, economic or otherwise, from the statute's operation, and, as a result, cannot make out the "case or controversy" between itself and the appellants needed to establish standing in the constitutional sense. E. g., Arlington Heights v. Metre politan Housing Dev. Corp., 429 U.S. 252, 260-264 (1977); Warth v. Seldin, 422 U.S. 490, 498-499 (1975).

6 During 1974, the Commission spent in excess of \$25,000 advertising Washington apples in the North Carolina market. Id., at 859.

Moreover, appellants assert, the Commission cannot rely on [*342] the injuries which the statute allegedly inflicts individually or collectively on Washington apple growers and dealers in order to confer [**2441] standing on itself. Those growers and dealers, appellants argue, are under no disabilities which prevent them from coming forward to pretect their own rights if they are, in fact, injured by the statute's operation. In any event, appellants contend that the Commission is not a proper representative of industry interests. Although this Court has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity, e.g., Warth v. Seldin, supra, at 511; National Motor Freight Assn. v. United States, 372 U.S. 246 (1963), the Commission is not a traditional voluntary membership organization such as a trade association, for it has no members at all. Thus, since the Commission has no members whose claims it might raise, and since it has suffered no "distinct and palpable injury" to itself, it can assert no more than an abstract concern for the well-being of the Washington apple industry as the basis for its standing. That type of interest, appellants argue, cannot "substitute for the concrete injury required by Art. III." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976).

[***LEdHR4] [4]If the Commission were a voluntary membership organization - a typical trade association - its standing to bring this action as the representative of its constituents would be clear under prior decisions of this Court. In Warth v. Seldin, supra, we stated: S

"Even in the absence of injury to itself, an association may have standing solely as the representative of its members.... The association must allege that its members, or any one of them, are suffering [***394] immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.... So long as this can be established, and so long as the nature of the claim and [*343] of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdi:-tion." 422 U.S., at 511.

See also Simon v. Eastern Ky. Welfare Rights Org., supra, at 39-40; Meek v. Pittenger, 421 U.S. 349, 355-356 n. 5 (1975); Sterra Club v. Morton, 405 U.S. 727, 739 (1972); National Motor Freight Assn. v. United States, supra. We went on in Warth to elaborate on the type of relief that an association could properly pursue on behalf of its members: S

"[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injun:tion, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly reco; nized standing in associations to represent their members, the relief sought has been of this kind." 422 U.S., at 515.1

Thus we have recognized that [HN3] an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of indiv dual members in the lawsuit.

The prerequisites to "associational standing" described in Warth are clearly present here. The Commission's complaint alleged, and the District Court found as a fact, that the North Carolina statute had caused some Washington apple growers and dealers (a) to obliterate Washington State grades from the [*344] large volume of closed containers destined for the North Carolina [**2442] market at a cost ranging from 5 to 15 cents per carton; (b) to abandon the use of preprinted containers, thus diminishing the efficiency of their marketing operations; or (c) to lose accounts in North Carolina. Such injuries are direct and sufficient to establish the requisite "case or controversy" between Washingt an apple producers and appellants. Moreover, the Commission's attempt to remedy these injuries are and to secure the industry's right to publicize its grading system is central to the Commission's purpose of protecting and enhancing the market for Washington apples. Finally, neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.

The only question presented, [***395] therefore, is whether, on this record, the Commission's status as a state agency, rather than a traditional voluntary membership organization, precludes it from asserting the claims of the Washington apple growers and dealers who form its constituency. We think not. The Commission, while admittedly a state agency, for all practical purposes performs the functions of a traditional trade association representing the Washington apple industry. As previously noted, its purpose is the protection and promotion of the Washington apple industry; and, in the pursuit of that end, it has engaged in advertising, market research and analysis, public education carapaigns, and scientific research. It thus serves a specialized segment of the State's economic community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation.

Moreover, while the apple growers and dealers are not "members" of the Commission in the traditional trade a sociation sense, they possess all of the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, [*345] through assessments levied upon them. In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests. Nor do we find it significant in determining whether the Commission may properly represent its constituency that "membership" is "compelled" in the form of mandatory assessments. Membership in a union, or its equivalent, is often required. Likewise, membership in a bar association, which may also be an agency of the Stat 1, is often a prerequisite to the practice of law. Yet in neither instance would it be reasonable to suggest that such an organization lacked standing to assert the claims of its constituents.

Finally, we note that the interests of the Commission itself may be adversely affected by the outcome of this litigation. The annual assessments paid to the Commission are tied to the volume of apples grown and packaged as "Washington Apples." In the event the North Carolina statute results in a contraction of the market for Washington apples or prevents any market expansion that might otherwise occur, it could reduce the amount of the assessments due the Commission and used to support its activities. This financial nexus between the interests of the Commission and its constituents coalesces with the other factors noted above to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S., at 204; see also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459-460 (1958).

Under the circumstances presented here, it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency. We therefore agree with the District Court that the [***396] Commission has standing to bring this action in a representational capacity.

[*346] [**2443] (3)

[***LEdHR2B] [2B]We turn next to the appellants' claim that the Commission has failed to satisfy the \$ 10,000 amount-in-controversy requirement of 28 U.S.C. § 1331. As to this, the appellants maintain that the Commission itself has not demonstrated that its right to be free of the restrictions imposed by the challenged statute is worth more than the requisite \$ 10,000. Indeed, they argue that the Commission has made no real effort to do so, but has instead attempted to rely on the actual and threatened injury to the individual Washington apple growers and dealers upon whom the statute I as a direct impact. This, they claim, it cannot do, for those growers and dealers are not parties to this litigation. Alter tatively, appellants argue that even if the Commission can properly rely on the claims of the individual growers and dealers, it cannot establish the required jurisdictional amount without aggregating those claims. Such aggregation, they argue, is impermissible under this Court's decisions in Snyder v. Harris, 394 U.S. 332 (1969), and Zahn v. International Paper Co., 414 U.S. 291 (1973).

[***LEdHR5] [5]Our determination that the Commission has standing to assert the rights of the individual growers and dealers in a representational capacity disposes of the appellants' first contention. Obviously, if the Commission has standing to litigate the claims of its constituents, it may also rely on them to meet the requisite amount in controversy. Hence, we proceed to the question of whether those claims were sufficient to confer subject-matter jurisdiction on the District Court. In resolving this issue, we have found it unnecessary to reach the aggregation question posed by the appellants for it does not appear to us "to a legal certainty" that the claims of at least some of the individual growers and dealers will not amount to the required \$ 10,000. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-7, 89 (1938).

[*347] [***LEdHR6] [6] [***LEdHR7] [7][HN4] In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation. E.g., McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 181 (1936); Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 139 U.S. 121, 126 (1915); Hunt v. New York Cotton Exchange, 205 U.S. 322, 336 (1907); 1 J. Moore, Federal Practice PP0.95, 0.96 (2d ed. 1975); C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3708 (1976). Here, that object is the right of the individual Washington apple growers and dealers to conduct their business affairs in the North Carolina market free from the interference of the challenged statute. The value of that right is measured by the losse: that will follow from the statute's enforcement. McNutt, supra, at 181; Buck v. Gallagher, 307 U.S. 95, 100 (1935); Kroger Grocery & Baking Co. v. Lutz, 299 U.S. 300, 301 (1936); Packard v. Banton, [***397] 264 U.S. 140, 142 (1924).

Here the record demonstrates that the growers and dealers have suffered and will continue to suffer losses of various types. For example, there is evidence supporting the District Court's finding that individual growers and shippers lost a counts in North Carolina as a direct result of the statute. Obviously, those lost sales could lead to diminished profits. There is also evidence to support the finding that individual growers and dealers incurred substantial costs in complying with the statute. As previously noted, the statute caused some growers and dealers to manually obliterate the Washington grades from closed containers to be shipped to North Carolina at a cost of from 5 to 15 cents per carton. Other dealers decided to alter their marketing practices, not without cost, by repacking apples or abandoning the use of prepr nted containers entirely, among other things. Such costs of [**2444] compliance are properly considered in computing the amount in controversy. Buck v. Gallagher, supra; Packard v. Banton, supra; Allway Taxi, Inc. v. New York, 340 F.Supp. 1120 [*348] (SDNY), aff'd, 468 F.2d 624 (CA2 1972). In addition, the statute deprived the grow-

ers and dealers of their rights to utilize most effectively the Washington State grades which, the record demonstrates, were of long standing and had gained wide acceptance in the trade. The competitive advantages thus lost could not be regained without incurring additional costs in the form of advertising, etc. Cf. Spock v. David, 502 F.2d 953, 956 (CA3 1974), rev'd on other grounds, 424 U.S. 828 (1976). Moreover, since many apples eventually shipped to North Carolina will have already gone through the expensive inspection and grading procedure, the challenged statute will have the additional effect of causing growers and dealers to incur inspection costs unnecessarily.

Both the substantial volume of sales in North Carolina — the record demonstrates that in 1974 alone, such sales were in excess of \$ 2 million? — and the continuing nature of the statute's interference with the business affairs of the Commission's constituents, preclude our saying "to a legal certainty," on this record, that such losses and expenses will not, in time, if they have not done so already, amount to the requisite \$ 10,000 for at least some of the individual growers and dealers. That is sufficient to sustain the District Court's jurisdiction. The requirements of § 1331 are therefore met.

7 In addition, apples worth approximately 30 to 40 percent of that amount were transshipped into North Carolina in 1974 after direct shipment to apple brokers and wholesalers located in other States.

(4)

[***LEdHR3B] [3B]We turn finally to the appellants' claim that the District Court erred in holding that the North Carolina statute violated the Commerce Clause insofar as it prohibited the display of Washington State grades on closed containers of apples shipped into the State. Appellants do not really contest the District Court's determination that the challenged statute burdened the Washington apple industry by increasing its [*349] costs of doing business in the North Carolina [***398] market and causing it to lose accounts there. Rather, they maintain that any such burdens on the interstate sale of Washington apples were far outweighed by the local benefits flowing from what they contend was a valid exercise of North Carolina's inherent police powers designed to protect its citizenry from fraud and deception in the marketing of apples.

Prior to the statute's enactment, appellants point out, apples from 13 different States were shipped into North Carolina for sale. Seven of those States, including the State of Washington, had their own grading systems which, whi e differing in their standards, used similar descriptive labels (e.g., fancy, extra fancy, etc.). This multiplicity of inconsistent state grades, as the District Court itself found, posed dangers of deception and confusion not only in the North Carolina market, but in the Nation as a whole. The North Carolina statute, appellants claim, was enacted to elimir ate this source of deception and confusion by replacing the numerous state grades with a single uniform standard. Mc reover, it is contended that North Carolina sought to accomplish this goal of uniformity in an evenhanded manner as evidenced by the fact that its statute applies to all apples sold in closed containers in the State without regard to their point of origin. Nonetheless, appellants argue that the District Court gave "scant attention" to the obvious benefits flow ng from the challenged legislation and to the long line of decisions from this Court holding that the States possess "broad powers" to protect local purchasers from fraud and deception in the marketing of foodstuffs. E.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Pacific [**2445] States Box & Basket Co. v. White, 296 L.S. 176 (1935); Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919).

[***LEdHR8] [8] [***LEdHR9] [9]As the appellants properly point out, not every exercise of state authority imposing some burden on the free flow of commerce is invalid. E.g., Great Atlantic & Pacific Tea Co. [*350] v. Cot rell, 424 U.S. 366, 371 (1976); Freeman v. Hewit, 329 U.S. 249, 252 (1946). Although the Commerce Clause acts as a imitation upon state power even without congressional implementation, e.g., Great Atlantic & Pacific Tea Co., supra, at 370-371; Freeman v. Hewit, supra, at 252; Cooley v. Board of Wardens, 12 How. 299 (1852), our opinions have long recognized that, S

[HN5] "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." Southern Pacific Co. v. Arizona ex rel Sullivan, 325 U.S. 761, 767 (1945).

Moreover, as appellants correctly note, that "residuum" is particularly strong when the State acts to protect its citiz:nry in matters pertaining to the sale of foodstuffs. Florida Lime & Avocado Growers, Inc., supra, at 146. By the same to-ken, however, a finding that state legislation furthers matters of [***399] legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view, we have noted, "would mean that the Commerce Clause of itself imposes no limitations on state action... save for the rare instance where a state artlessly discloses

an avowed purpose to discriminate against interstate goods." Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951). Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national "con mon market," we are confronted with the task of effecting an accommodation of the competing national and local interests. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Great Atlantic & Pacific Tea Co., supra, at 370-372. We turn to that task.

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most [*351] obvious, is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. As p eviously noted, this disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still tree to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Second, the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade. Indeed, it contains numerous affidavits from apple brokers and dealers located both inside and outside of North Carolina who state their preference, and that of their customers, for apples graded under the Washington, as opposed to the USDA system, because of the former's greater consistency, [**2446] its emphasis on color, and its supporting mandatory inspections. Once again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit.

hird, by prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington's State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at [*352] work, Washington sellers would normally enjoy a distinct market advantage vis-a-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which [***400] would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such "downgrading" offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended by product and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed....." App. 21 (emp tasks added). Moreover, we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers. However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the [*353] display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

[***LEdHR10] [10][HN6] When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nond scriminatory alternatives adequate to preserve the local interests at stake. Dean Milk Co. v. Madison, 340 U.S., at 354.5 ee also Great Atlantic & Pacific Tea Co., 424 U.S., at 373; Pike v. Bruce Church, Inc., 397 U.S., at 142; Polar Ice Crean & Creamery Co. v. Andrews, 375 U.S. 361, 375 n. 9 (1964); Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 524 (1931). North Carolina has failed to sustain that burden on both scores.

The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at

least with respect to Washington apples and grades. The statute, as already noted, permits the marketing of closed containers of apples under no grades at all. Such a result can hardly be thought to eliminate the problems of deceptior and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality [***401] of the contents of closed apple containers. Moreover, [**2447] although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate. Finally, we note that any potential [*354] for confusion and deception created by the Washington grades * was not of the type that led to the statute's enactment. Since Washington grades are in all cases equal or superior to their USDA counterparts, they could only "deceive" or "confuse" a consumer to his benefit, hardly a harmful result.

8 Indeed, the District Court specifically indicated in its findings of fact that there had been no showing that the Washington State grades had caused any confusion in the North Carolina market. 408 F.Supp., at 859.

In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize: tate grades only if they also marked their shipments with the applicable USDA label. In that case, the U.S.D.A. grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington's, could not be demonstrated to be equal or superior to the corresponding USDA categories. Concedely, even in this latter instance, some potential for "confusion" might persist. However, it is the type of "confusion" that the national interest in the free flow of goods between the States demands be tolerated.

9 Our conclusion in this regard necessarily rejects North Carolina's suggestion that the burdens on commarce imposed by the statute are justified on the ground that the standardization required by the statute serves the tational interest in achieving uniformity in the grading and labeling of foodstuffs.

The judgment of the District Court is

Affirmed

MR. JUSTICE REHNQUIST took no part in the consideration or decision of the case.

REFERENCES

32 Am Jur 2d, Federal Practice and Procedure 129 et seq.; 52 Am Jur 2d, Markets and Marketing 32; 59 Am Jur 2c, Parties 27

1 Federal Procedural Forms L Ed, Actions in District Court 1:11 et seq.

5 Am Jur Pl & Pr Forms (Rev Ed), Commerce, Form 3; 11 Am Jur Pl & Pr Forms (Rev Ed), Federal Practice and Frocedure, Forms 541 et seq.

28 USCS 1331; Constitution, Article I, Section 8, Clause 3

US L Ed Digest, Commerce 200; Courts 427, 431; Parties 23

ALR Digests, Commerce 115; Courts 290; Parties 71

L Ed Index to Annos, Amount in Controversy; Commerce; Containers; Parties

ALR Quick Index, Amount in Controversy; Capacity to Sue or be Sued; Commerce; Containers; Grading of Produits

Federal Quick Index, Commerce ; Containers ; Injunctions; Parties

Annotation References:

Supnome Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (28 USCS 2201). 40 L Ed 2d 783.

Com nerce clause of Federal Constitution as violated by state or local regulation or prohibition affecting business of selling, distributing, packaging, packing, labeling, or processing food intended for human consumption. 25 L Ed 2d 846.

Juris-lictional amount in Federal case other than for recovery of money judgment. 81 L Ed 189.

Crite ion of jurisdictional amount to vest jurisdiction of federal court where injunction is sought. 30 ALR2d 602.

Jurisilictional amount in its relation to suit for declaratory judgment. 115 ALR 1489.

Valicity of statute or ordinance as to "containers." 5 ALR 1068, 101 ALR 862.

9.



LEXSEE

Questioned As of: Mar 07, 2011

UNITED STATES ET AL. v. STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.

No. 72-535

SUPREME COURT OF THE UNITED STATES

412 U.S. 669; 93 S. Ct. 2405; 37 L. Ed. 2d 254; 1973 U.S. LEXIS 20; 5 ERC (BNA) 1449; 3 ELR 20536

> February 28, 1973, Argued June 18, 1973, Decided

Together with No. 72-562, Aberdeen & Rockfish Railroad Co. et al. v. Students Challenging Regulatory Agency Procedures (SCRAP) et al., also on appeal from the same court.

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF

COLUMBIA.

DISPOSITION:

346 F.Supp. 189, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, the United States and the Interstate Commerce Commission, sought review of a decision of the United States District Court for the District of Columbia, which granted appellee association's petition for an injunction prohibiting railroads from collecting a surcharge insofar as it related to goods being transported for turposes of recycling.

OV 3RVIEW: Appellee association filed suit against appellants, the United States and the Interstate Commerce Commission, seeking a preliminary injunction to restrain enforcement of the Commission's orders that allowed railroads to collect a surcharge. Appellees argued that the Interstate Commerce Commission's (ICC) decisions, insofar as they declined to suspend a 2.5 percent surcharge, were unlawful because the ICC failed to include a detailed environmental impact statement as required by § 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.S. § 433.1(2)(C). Appellants challenged appellees' standing to sue, arguing that the allegations in the pleadings as to standing were vague, unsubstantiated, and insufficient under prior case law. The district court granted a preliminary injunction, suspending the rates. The court reversed and remanded, finding that the district court lacked the power to act. Nowhere in the legislative history or statutory language of NEPA was there any indication that Congress intended to restore to the federal courts the power temporarily to suspend railroad rates.

OUTCOME: The court reversed the judgment and remanded the case.

LexisNexis(R) Headnotes

Transportation Law > Rail Transportation > Rates & Tariffs [HN1] See 49 U.S.C.S. § 6(3).

Transportation Law > Rail Transportation > Rates & Tariffs Transportation Law > Rail Transportation > Routes & Services [HN2] See 49 U.S.C.S. § 15(7).

Administrative Law > Judicial Review > Reviewability > Standing Environmental Law > Litigation & Administrative Proceedings > Judicial Review [HN3] See § 10 of the Administrative Procedure Act, 5 U.S.C.S. § 702.

Administrative Law > Judicial Review > Reviewability > Standing Civil Procedure > Justiciability > Standing > Injury in Fact

Environmental Law > Litigation & Administrative Proceedings > Judicial Review

[HN4] Section 10 of the Administrative Procedure Act, 5 U.S.C.S. § 702, confers standing to obtain judicial review of agency action only upon those who can show that the challenged action caused them "injury in fact," and where the alleged injury was to an interest arguably within the zone of interests to be protected or regulated by the statutes that the agencies were claimed to have violated.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Justiciability > Standing > Injury in Fact

[HN5] In interpreting "injury in fact" under § 10 of the Administrative Procedure Act, 5 U.S.C.S. § 702, standing is 10t confined to those who can show "economic harm." Nor, can the fact that many persons share the same injury be sufficient reason to disqualify from seeking review of an agency's action any person who has in fact suffered injury.

Administrative Law > Agency Adjudication > Prehearing Activity

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN6] Pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be rue and capable of proof at trial.

Administrative Law > Judicial Review > Reviewability > Standing Civil Procedure > Justiciability > Standing > General Overview

[HN7] The term "injury in fact" reflects the statutory requirement of § 10 of the Administrative Procedure Act, 5 U.S.C.S. § 702, that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation-even though small-from a person with a mere interest in the problem. An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the princip e supplies the motivation.

Environmental Law > National Environmental Policy Act > General Overview [HN8] See 42 U.S.C.S. § 4331.

En ironmental Law > National Environmental Policy Act > General Overview

[H19] 42 U.S.C.S. § 4335 specifies that the policies and goals set forth in the National Environmental Policy Act of 1969 are supplementary to those set forth in existing authorizations of federal agencies.

Environmental Law > National Environmental Policy Act > General Overview

[H110] 42 U.S.C.S. § 4334 instructs that the National Environmental Policy Act of 1969 (NEPA) shall not in any way affect the specific statutory obligations of any Federal agency. Rather than providing for any wholesale overruling of pricer law, NEPA requires all federal agencies to review their present statutory authority, administrative regulations, and can ent policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of NEPA and shall propose to the President suc a measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in NEPA, 42 U.S.C.S. § 4333.

SUMMARY:

After substantially all of the nation's railroads, pursuant to the Interstate Commerce Act, filed with the Interstate Cor umerce Commission for a proposed 2.5 percent surcharge on nearly all freight rates as an interim emergency measure to produce increased revenues pending adoption of proposed selective, permanent rate increases, and after the Cor mission refused to exercise its power under 15(7) of the Interstate Commerce Act to suspend the surcharge, but ord-red the proposed permanent rate increases suspended for the statutory 7-month period in order to investigate the law ulness of such rate increases, thus permitting the collection of the surcharge until the end of the 7-month period, an acti in against the United States and the Commission was filed in the United States District Court for the District of Columbia, wherein environmental protection groups sought, among other relief, a preliminary injunction to restrain enforcement of the Commission's orders allowing the carriers to collect the surcharge. The plaintiffs alleged that (1) its mer ibers used the forests, streams, and other resources in the area for camping, hiking, fishing, and sightseeing, (2) such use was directly disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought abo it by the surcharge on such goods, thereby encouraging increased use of nonrecyclable goods, and (3) the Commissior's orders refusing to suspend the surcharge were unlawful because of its failure to include an environmental impact state-ment as required by 102(2)(C) of the National Environmental Policy Act of 1969, requiring such a statement as to maj or federal actions significantly affecting the quality of the human environment. On the plaintiffs' motion for preliminary injunction and the defendants' cross-motion to dismiss the complaint, a three-judge District Court (1) held that the plai stiff had standing to sue and the court had power to grant an injunction under the implicit authority conferred by the Nat onal Environmental Policy Act, and (2) granted a preliminary injunction forbidding the Commission from permitting and the railroads from collecting the surcharge with regard to goods being transported for purposes of recycling (34t · F Supp 189).

On direct appeal, the United States Supreme Court reversed and remanded. In an opinion by Stewart, J., it was held that (1) expressing the view of five members of the court, in light of the allegations as to the plaintiffs' use of the area's forests and streams, and as to the direct disturbance of such use caused by the imposition of the surcharge on recyclable goo is, the plaintiffs had sufficiently alleged, and if they proved the allegations would establish, standing to sue as person: "adversely affected" or "aggrieved" by agency action within the meaning of 10 of the Administrative Procedure Act, which confers standing to seek judicial review of agency action, but (2) expressing the view of six members of the court, nevertheless the District Court lacked jurisdiction to enter the preliminary injunction against collecting the surcharge with regard to recyclable goods, since (a) 15(7) of the Interstate Commerce Act vested exclusive power in the Commission to suspend rates pending its final decision on their lawfulness and withdrew from the judiciary any pre-existing power to grant such relief, and (b) the National Environmental Policy Act did not amend or repeal 15(7) so as to restore to the federal courts the power temporarily to suspend the railroad rates, even in the absence of compliance with the impact statement requirements of the National Environmental Policy Act.

Blackmun, J., joined by Brennan, J., concurred, expressing the views that (1) the plaintiffs had standing to maintain the action based on their allegations of harm to the environment resulting from the Commission's orders, and (2) with regard to determining whether injunctive relief was warranted, the plaintiffs should not be required to prove that they in fact were injured, but only that the environment was injured in fact and that such injury was irreparable and substantial.

Douglas, J., dissented in part, agreeing with the holding that the plaintiffs had standing to sue, but expressing the view that the District Court's decision should have been affirmed since the policy of the National Environmental Policy Act to protect the environment and natural resources was applicable to, and should have been observed by, the Internate Commerce Commission, particularly in view of the importance of environmental problems and the critical need for transportation rates which would encourage the shipment of litter for recycling.

White, J., joined by Burger, Ch. J., and Rehnquist, J., dissenting in part, stated that (1) it should be held that the plaintiffs lacked standing to sue since they had not alleged the necessary injury in fact to establish a justiciable case or controversy, but (2) assuming standing to sue, nevertheless it was properly held that the District Court lacked power to enter the injunction.

Marshall, J., concurred in the holding that the plaintiffs had standing to sue, but dissented from the holding that the District Court lacked power to issue the preliminary injunction, expressing the view that such injunction was within the court's traditional equitable power to grant interim injunctive relief to maintain the status quo pending final judicial determination of the legality of the Commission's action at the suspension stage in light of the requirements of the National Environmental Policy Act.

Powell, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ADMINISTRATIVE LAW §223

INTERSTATE COMMERCE COMMISSION §203

PLEADING §114

standing to sue -- review of ICC action -- sufficiency of allegations --

Headnote:[1]

The allegations in a complaint as to the standing to sue of environmental protection groups, challenging the legi lity of the Interstate Commerce Commission's refusal to suspend a temporary surcharge by most of the nation's railroads on nearly all freight rates, including rates on transporting recyclable materials, without the Commission's first having is sued an environmental impact statement under 102(2)(C) of the National Environmental Policy Act of 1969 (42 USCS 4332(2)(C)), are sufficient to withstand a motion to dismiss, where it is alleged that (1) the members of the plaintiff groups used the forests, streams, and other resources in a certain area for camping, hiking, fishing, and sightseeing, and (2) such use was directly disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by the surcharge on such goods, thus encouraging increased use of nonrecyclable commodities—the pleadings thus sufficiently alleging that the plaintiffs were "adversely affected" or "aggrieved" within the meaning of 10 of the Administrative Procedure Act (5 USCS 702), conferring standing to seek judicial review of agency action; if such allegations are proved, the plaintiffs are entitled to seek review as having suffered injury in fact by the Commission's action.

[*** LEdHN2]

ADMINISTRATIVE LAW §220

right to review - injury in fact -

Headnote: [2]

Section 10 of the Administrative Procedure Act (5 USCS 702) confers standing to obtain judicial review of agency action only upon those who can show that the challenged action has caused them injury in fact, and only where the zl-leged injury is to an interest arguably within the zone of interests to be protected or regulated by the statutes that the agencies are claimed to have violated.

[***LEdHN3]

ADMINISTRATIVE LAW §220

right to review -- injury in fact -- environmental interest --

Headnote:[3]

With regard to showing "injury in fact" so as to establish standing to obtain judicial review of agency action under 10 of the Administrative Procedure Act (5 USCS 702), standing is not confined to those who can show economic harm; aes hetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in society and the fact that particular environmental interests are shared by the many rather than the few does not make the n less deserving of legal protection through the judicial process.

[***LEdHN4]

ADMINISTRATIVE LAW §220

right to review - injury in fact --

Headnote:[4]

With regard to showing "injury in fact" so as to establish standing to obtain judicial review of agency action under 10 of the Administrative Procedure Act (5 USCS 702), the fact that many persons share the same injury is not sufficient rea: on to disqualify from seeking review of an agency's action any person who has in fact suffered injury.

["LEdHN5]

PLEADING §1

nature --

Headnote:[5]

Pleadings must be something more than an ingenious academic exercise in the conceivable.

[* * LEdHN6]

PLEADING \$114

standing to sue -- review of administrative action --

Headnote:[6]

With regard to pleading standing to obtain judicial review of agency action under 10 of the Administrative Procedure Act (5 USCS 702), a plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action; such allega-

[***LEdHN7]

ADMINISTRATIVE LAW §223

right to review -- aggrieved persons --

Headnote:[7A][7B]

Under 10 of the Administrative Procedure Act (5 USCS 702), which provides that a person "adversely affected" or "agg rieved" by agency action is entitled to judicial review thereof, standing to sue is not limited to those who have been "sig tificantly" affected by agency action; an identifiable trifle is enough for standing to fight out a question of principle, the trifle being the basis for standing and the principle supplying the motivation. [***LEdHN8]

PLEADING §105

standing to sue -- evidence --

Headnote:[8A][8B]

In an action by environmental protection groups challenging the legality of certain action by the Interstate Commerce Commission as to railroad freight rates, the Federal District Court cannot be faulted for failing to take evidence on the issue of the plaintiffs' standing to sue, where the complaint contained sufficient allegations as to standing, and the issue came before the court on motions by the defendants to dismiss the complaint and by the plaintiffs for a preliminary injunction.

[***LEdHN9]

INTERSTATE COMMERCE COMMISSION §56
INTERSTATE COMMERCE COMMISSION §118
STATUTES §238
railroad rates -- suspension -- power of ICC and courts -Headnote:[9A][9B]

In an action by environmental protection groups challenging the legality of the Interstate Commerce Commission's decision not to suspend a temporary surcharge by most of the nation's railroads on nearly all freight rates, including rates on transporting recyclable materials, pending adoption of permanent, selective rate increases, a Federal District Court lacks jurisdiction to enter a preliminary injunction forbidding the Commission from permitting and the railroa is from collecting the surcharge insofar as it relates to goods being transported for purposes of recycling—notwithstanding the Commission's alleged failure to issue a detailed environmental impact statement under 102(2)(C) of the National Environmental Policy Act of 1969 (42 USCS 4332(2)(C)), which requires such a statement as to major federal actions significantly affecting the quality of the human environment—since 15(7) of the Interstate Commerce Act (49 USCS 15 (7)), which authorizes the Commission to suspend the operation of proposed new railroad rates for a maximum of 7 months from the effective date thereof pending the Commission's determination of the lawfulness of the new rates, vests exclusive power in the Commission to suspend rates pending its final decision on their lawfulness and withdraws from the judiciary any pre-existing power to grant such relief, and since the National Environmental Policy Act does not amend or repeal 15(7) sub silentio so as to restore to the federal courts the power temporarily to suspend railroad rates.

[***LEdHN10]

INTERSTATE COMMERCE COMMISSION §118
railroad rates -- suspension -- power of courts -Headnote:[10]

Under 15(7) of the Interstate Commerce Act (49 USCS 15(7)), which vests exclusive power in the Interstate Commerce Commission to suspend the operation of proposed new railroad rates for a maximum of 7 months from the effective date thereof pending the Commission's determination of the lawfulness of the new rates, the courts lack power to grant any injunction against the collection of new rates before the Commission has finally determined the lawfulness of such rates, regardless of whether an injunction is sought before or after the expiration of the statutory 7-month period, and regardless of whether the injunction is sought against the Commission as well as the railroads.

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[***LEdHN11]
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INTERSTATE COMMERCE COMMISSION §57 railroad rates -- surcharge -- reasonableness --Headnote:[11A][11B]

In determining not to exercise its power under 15(7) of the Interstate Commerce Act (49 USCS 15 (7)) to suspend proposed new railroad rates pending determination of the lawfulness of such rates, the Interstate Commerce Commission's reference to a proposed temporary surcharge by railroads on existing freight rates, pending adoption of permanent, selective rate increases, as being "just and reasonable" is merely a preliminary assessment in refusing to suspend the surcharge, and does not represent a final determination by the Commission that any particular rate is just and reasonable.

[***LEdHN12]

INTERSTATE COMMERCE COMMISSION §55

surcharge -- carrier-made rate --

Headnote:[12A][12B]

In determining not to exercise its power under 15(7) of the Interstate Commerce Act (49 USCS 15(7)) to suspend a ten porary surcharge on most freight rates proposed by railroads pending determination of the lawfulness of such surcharge, the Interstate Commerce Commission's imposition of standard conditions, including an expiration date for the sur tharge to coincide with the effective date of proposed permanent, selective rate increases, does not transform the sur harge from a carrier- made rate into a Commission-made rate.

[* "*LEdHN13]

STATUTES §236

implied repeals -- National Environmental Policy Act --

Headnote:[13]

The National Environmental Policy Act of 1969 (42 USCS 4321 et seq.) is not intended to repeal by implication any other statute.

[* "*LEdHN14]

ADMINISTRATIVE LAW §12

implementation of National Environmental Policy Act --

Headnote:[14]

Federal agencies have the primary responsibility for the implementation of the National Environmental Policy Act of 1969 (42 USCS 4321 et seq.),

[* * * LEdHN15]

STATUTES §229

implied repeal --

Headnote:[15A][15B]

Repeal of a statute by implication is disfavored.

SYLLABUS

The Interstate Commerce Act permits railroads to file proposed freight rate increases, with at least 30 days' notice to the Interstate Commerce Commission (ICC) and the public before putting the new rates into effect. The ICC may, pun uant to § 15 (7) of the Act, suspend the operation of the proposed rates for as long as seven months, in order to investigate the lawfulness of the rates. At the end of the seven-month period, the carrier may put the suspended rates into effect unless the ICC has completed its investigation and found the rates unlawful. Proceeding under the statutory scheme, substantially all the Nation's railroads sought a 2.5% surcharge on nearly all freight rates, as an emergency measure to obtain increased revenues pending adoption of selective rate increases on a permanent basis. Shippers, corr peting carriers, and other interested persons requested the ICC to suspend the tariff for the statutory seven-month period. Various environmental groups, including Students Challenging Regulatory Agency Procedures (SCRAP) and the Environmental Defense Fund, appellees here, protested that failure to suspend the surcharge would cause their mer thers "economic, recreational and aesthetic harm," and specifically, that the new rate structure would discourage the use of "recyclable" materials and promote the use of raw materials that compete with scrap, thus adversely affecting the env ronment. On February 1, 1972, the ICC issued an order announcing its decision not to suspend the surcharge for the seven-month period, and on April 24, 1972, ordered the proposed selective increases filed by the carriers to be suspended for the full seven-month period ending November 30, 1972, and permitted the collection of the surcharge until

that date. SCRAP filed the present suit seeking, inter alia, an injunction to restrain enforcement of the February 1 and April 24 orders allowing the carriers to collect the surcharge. SCRAP, an unincorporated association formed by five law students to enhance the quality of the environment, claimed that its members "suffered economic, recreational and as sthetic harm directly as a result of the adverse environmental impact of the railroad freight structure," that each of its members was caused to pay more for finished products, that each of its members uses the forests, rivers, mountains, and other natural resources of the Washington, D. C., area and at his legal residence for camping, hiking, fishing, and off er purposes, and that these uses have been adversely affected by increased freight rates. The main thrust of SCRAP's complaint was that the ICC's orders were unlawful for failure to include a detailed environmental impact statement as required by \$ 102 (2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. \$ 4332 (2)(C). Th: three-judge District Court found that appellees had standing to sue. The court held that its power to grant an injunction was not barred by Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, because NEPA "implicitly confers at thority on the federal courts to enjoin any federal action taken in violation of NEPA's procedural requirements . . . sc long as the review is confined to a determination as to whether the procedural requisites of NEPA have been followed." The court concluded that the ICC's decision not to suspend the surcharge for the seven-month period was a "major federal action significantly affecting the quality of the human environment," and granted an injunction prohibiting the I/2C "from permitting" and the railroads "from collecting" the surcharge "insofar as that surcharge relates to goods being transported for purposes of recycling," Held:

- Appellees' pleadings sufficiently alleged that they were "adversely affected" or "aggrieved" within the meaning of § 10 of the Administrative Procedure Act to withstand a motion to dismiss on the ground of lack of standing to sue. Sierra Club v. Morton, 405 U.S. 727, distinguished. Pp. 683-690.
- (a) Standing is not confined to those who show economic harm, as "aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society." Sierra Club, supra, at 734. P. 6::6.
- (b) Here, the appellees claimed that the specific and allegedly illegal action of the ICC would directly harm then in their use of the natural resources of the Washington area. Pp. 686-687.
 - (c) Standing is not to be denied because many people suffer the same injury. Pp. 687-688.
- (d) It cannot be said on these pleadings that appellees could not prove their allegations, which, if proved, would place them squarely among those persons injured in fact by the ICC's action and entitled to review under Sierra Clus, supra. Pp. 688-690.
 - The District Court lacked jurisdiction to issue the injunction. Pp. 690-698.
- (a) Arrow Transportation, supra, held that Congress in § 15 (7) had vested exclusive jurisdiction in the ICC to suspend rates pending its final decision on their lawfulness and had deliberately extinguished judicial power to grant such relief; and the factual distinctions between the instant case and Arrow Transportation are inconsequential. Pp. 690-692.
- (b) The alleged noncompliance by the ICC with NEPA did not give the District Court authority to grant the injunction, as NEPA was not intended to repeal by implication any other statute, and the policies identified in Arrow Transportation as the basis for § 15 (7) would be substantially undermined if the courts were found to have suspension powers simply because of noncompliance with NEPA. Pp. 692-698.

COUNSEL: Solicitor General Griswold argued the cause for the United States et al. in No. 72-535. With him on the briefs were Assistant Attorney General Frizzell, Edward R. Korman, Fritz R. Kahn, Betty Jo Christian, and James F Tao. Hugh B. Cox argued the cause for appellants in No. 72-562. With him on the briefs were Charles A. Horsky Michael Boudin, and Edward A. Kaier.

- Peter H. Meyers argued the cause pro hac vice for Students Challenging Regulatory Agency Procedures, appellee in both cases. With him on the brief was John F. Banzhaf III. John F. Dienelt argued the cause pro hac vice for Environmental Defense Fund et al., appellees in both cases. With him on the brief was Dennis M. Flannery.
 - Jerome J. McGrath filed a brief for Independent Natural Gas Association of America as amicus curiae u ging reversal.

Edward L. Merrigan filed a brief for National Association of Secondary Material Industries, Inc., as amizus curiae urging affirmance.

JUDGES: Stewart, J., delivered the opinion of the Court, in which Brennan and Blackmun, JJ., joined; in Parts I and II of which Douglas and Marshall, JJ., joined; and in Parts I and III of which Burger, C. J., and White and Rehnquist, JJ., joined. Blackmun, J., filed a concurring opinion, in which Brennan, J., joined, post, p. 699. Douglas, J., filed an opinion dissenting in part, post, p. 699. White, J., filed an opinion dissenting in part, in which Burger, C. J., and Rehnquist, J., joined, post, p. 722. Marshall, J., filed an opinion concurring in part and dissenting in part, post, p. 724.

OPINION BY: STEWART

OPINION

[*672] [***261] [**2408] MR. JUSTICE STEWART delivered the opinion of the Court.

Under the Interstate Commerce Act, the initiative for rate increases remains with the railroads. But in the absence of special permission from the Interstate Commerce Commission, a railroad seeking an increase must provide at least 30 days' notice to the Commission and the public before putting the new rate into effect. 49 U. S. C. § 6 (3). During that most spending [**2409] an investigation and decision on the lawfulness of the new rates. 49 U. S. C. § 15 (7). At Cost unission has earlier completed its investigation and found the rate unlawful.

- Title 49 U. S. C. § 6 (3) provides: [HN1] "No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulaschedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest."
- Title 49 U. S. C. § 15 (7) provides in pertinent part: [HN2] "Whenever there shall be filed with the Commission any schedule stating a new . . . rate, fare, or charge, . . . the Commission shall have . . . authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge . . . ; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge . . . , but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, [or] charge . . . goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, [or] charge . . . shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, [or] charge . . . after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, [or] charge . . . is just and reasonable, and the Commission shall give to the hearing

and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

3 Other statutory provisions giving suspension powers to the Commission include 49 U. S. C. §§ 316 (g), 118 (c) (Motor Carrier Act); 49 U. S. C. §§ 907 (g), (i) (Water Carrier Act); 49 U. S. C. § 1006 (e) (Freight Forwarders Act).

Proceeding under this regulatory scheme, on December 13, 1971, substantially all of the railroads in the United States requested Commission authorization to file on 5 days' notice a 2.5% surcharge on nearly all freight rates. The railroads sought a January 1, 1972, effective date for the new rates. The surcharge was proposed as an interim emergency measure designed to produce some \$ 246 million annually in increased revenues pending adoption of selective rate increases on a permanent basis.

As justification for the proposed surcharge, the railroads alleged increasing costs and severely inadequate reven ies. In its last general revenue increase case, less than two years earlier, the Commission had found:

"The financial condition of the railroad industry as a whole, and the financial status of many individual carriers by rail, must be found to be at a dangerously low level. The precipitous decline in working capital and serious loss of i-quidity has reduced many carriers to a truly marginal operation. This has been most clearly demonstrated by the resent bankruptcy application of the Penn Central. We think it undeniable that a number of [*675] other roads are approaching a similar financial crisis." Ex parte Nos. 265/267, Increased Freight Rates, 1970 and 1971, 339 L.C. C. 125, 173.

The railroads alleged that, since the close of that proceeding, their costs had increased by over \$ 1 billion on an annual basis, including \$ 305 million in increased wages, while economic indicators such as decreased [***263] working capital and [**2410] increased debt obligations pointed toward an ever-worsening financial condition.

4 Figures reported to the Commission indicated that the net working capital of the Class I railroads for the 12 months ending September 30, 1971, was only \$ 75.4 million, approximately \$ 33.7 million less than the year-end 1970 figure. Long-term debt maturing within one year from September 30, 1971, was \$ 43.6 million higher than on December 31, 1970. Equipment obligations at the end of 1970 were \$ 4,448 million, or almost twice the total in 1960.

In an order dated December 21, 1971, the Commission acknowledged the need, particularly of some carriers, for increased revenues, but it concluded that five days' notice and a January 1, 1972, effective date "would preclude the public from effective participation." Ex parte No. 281, Increased Freight Rates and Charges, 1972, 340 L.C. C. 358, 361. The Commission authorized the railroads to refile the 2.5% surcharge with not less than 30 days' notice, and an effective date no earlier than February 5, 1972.

On January 5, 1972, the railroads refiled the surcharge, to become effective on February 5, 1972. Shippers, conpeting carriers, and other interested persons requested the Commission to suspend the tariff for the statutory seven-month period. Various environmental groups, including Students Challenging Regulatory Agency Procedures
(SCRAP) and the Environmental Defense Fund (EDF), two of the appellees here, protested that failure to suspend the
surcharge would cause their members "economic, [*676] recreational and aesthetic harm." Specifically, they claimed
that the rate structure would discourage the use of "recyclable" materials, and promote the use of new raw materials that
compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and
other extractive activities. The members of these environmental groups were allegedly forced to pay more for finished
products, and their use of forests and streams was allegedly impaired because of unnecessary destruction of timber and
extraction of raw materials, and the accumulation of otherwise recyclable solid and liquid waste materials. The railroads replied that since this was a general rate increase, recyclable materials would not be made any less competitive
relative to other commodities, and that in the past general rate increases had not discouraged the movement of scrap
materials.

The Commission issued an order on February 1, 1972, shortly before the surcharge would have automatically become effective. It recognized that "the railroads have a critical need for additional revenue from their interstate freight rates and charges to offset, in part, recently incurred increased operating costs," and announced its decision not to suspend the 2.5% surcharge for the seven-month statutory period. In anticipation of the proposed permanent selective increases to be filed by the railroads and to avoid further complication of the tariff rates, the Commission specified that its refusal to suspend was conditioned upon the carriers' setting an expiration date for the surcharge of no later than une 5, 1972. The Commission [***264] ordered the investigation into [*677] the railroads' rates which had been in-

stit ited by its December 21 order to be held in abeyance until the carriers requested permission to file the indicated per nanent rate [**2411] increases on a selective basis. With respect to the appellees' environmental arguments, the Commission found that "the involved general increase will have no significant adverse effect on the movement of traffic by ailway or on the quality of the human environment within the meaning of the [National] Environmental Policy Act

- 5 The order of the ICC is unreported.
- 6 The Commission also imposed as a condition on its refusal to suspend the exclusion of increased rates "on freight in trailer bodies, semi-trailers, vehicles or containers on flat cars, on export and import traffic." Since such increases had been proposed only by the western and southern carriers and not by the eastern carriers, such increases would, in the Commission's view, have disrupted existing port relationships.

Finally, the Commission conditioned its action on the provision that the proposed surcharge would not apply to shipments originating prior to February 5, 1972, and moving under transit arrangements.

The proposed permanent selective increases, averaging 4.1%, were subsequently filed with the Commission, and various parties again requested that these proposed rates also be suspended. By order served March 6, 1972, the Commission did not grant the railroads' request to have the selective increases go into effect on April 1, 1972, as they had sou jth but it allowed the carriers to republish their rates to become effective on May 1, 1972, upon not less than 45 aug ending the proposed selective increase for the full seven-month period allowed by statute, or to and including November 30, 1972. The investigation into the increased rates was continued. Since the selective increases were to supplie t the temporary surcharge, and since they had been suspended, the Commission modified its February 1 order and surcharge until November 30, 1972.

7 The March 6 and April 24 orders of the ICC are unreported.

On May 12, 1972, SCRAP filed the present suit against the United States and the Commission in the District Court for the District of Columbia seeking, along with other relief, a preliminary injunction to restrain enforcement of the Commission's February 1 and April 24 orders allowing the railroads to collect the 2.5% surcharge.

SCRAP stated in its amended complaint that it was "an unincorporated association formed by five law students ... in September, 1971. Its primary purpose is to enhance the quality of the human environment for its members, and for all citizens ... "To establish standing to bring this suit, SCRAP repeated many of the allegations it had made before the Commission in Ex parte 281. It claimed that each of its members "suffered economic, recreational and aesthetic harr i directly as a result of the adverse environmental impact of the railroad freight structure, as modified by the Commission's actions to date in Ex Parte 281." Specifically, SCRAP alleged that each of its members was caused to pay more; for finished products, that each of its members "uses the forests, rivers, streams, mountains, and other natural resign seeing, and other recreational [***265] [and] aesthetic purposes," and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.

[*679] The main thrust of SCRAP's complaint was that the Commission's decisions of February 1 and April 24, inso are as they declined to suspend the 2.5% surcharge, were unlawful because the Commission had failed to include a detailed environmental impact statement as required by § 102 (2)(C) of the National Environmental Policy Act of 1969 (NE A), 42 U. S. C. § 4332 (2)(C). NEPA requires such a statement in "every recommendation or report on proposals for Legislation and other major Federal actions significantly affecting the quality of the human environment..."

[**2412] Ibid. SCRAP contended that because [*680] of its alleged adverse impact upon recycling, the Commission's action with respect to the surcharge constituted a major federal action significantly affecting the environment.

8 Section 102, 42 U. S. C. § 4332, provides in pertinent part;

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set fort i in this chapter, and (2) all agencies of the Federal Government shall --

- "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official in
 - "(i) the environmental impact of the proposed action,
 - "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - "(iii) alternatives to the proposed action,
- "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes."

Three additional environmental groups, also appellees here, were allowed to intervene as plaintiffs, and a group of railroads, appellants here, intervened as defendants to support the 2.5% surcharge. * After [***266] a single district [*681] judge had denied the defendants' motion to dismiss and SCRAP's motion for a temporary restraining order, a statutory three-judge district court was convened [**2413] pursuant to 28 U. S. C. §§ 2284, 2325, to decide the motion for a preliminary injunction and the cross-motion to dismiss the complaint.

9 The Environmental Defense Fund, National Parks and Conservation Association, and Izaak Walton League of America intervened as plaintiffs. The allegations as to standing made by each of these groups were simil in to those made by SCRAP. EDF, for example, alleged as follows:

"EDF has a nationwide membership of over 32,000 persons composed of scientists, educators, lawyers and other citizens dedicated to the protection of our environment and the wise use of our natural resources. Each of EDF's members has a personal interest in the maintenance of a safe, healthful, productive environment as free from waste substances as is possible. EDF's members have contributed financially to EDF in part so that they may obtain adequate representation of their legally protected environmental interests, which representation they could not otherwise individually afford. Each of EDF's members has under § 101 (c) of NEPA, 'a responsibility to contribute to the preservation and enhancement of the environment,' which responsibility they fulfill in pa t by becoming a member of and contributing to EDF.

"The increased freight rates and charges in Ex Parte 281 and the continuance of the underlying rate structure, which discriminate against movement of secondary (recyclable) materials, will cause EDF members incividualized injury and adversely affect them in one or more of their activities and pastimes. Specifically, each EDF member: (i) has been or will be caused to pay more for products in the market place, made more expensive by both the non-use of recycled materials in their manufacture, and the need to use comparatively more energy in processing primary raw materials as opposed to secondary (recyclable) materials; (ii) uses the nation's forests, rivers, streams, mountains, and other natural resources for camping, hiking, fishing, sightseeing, and other recreational and aesthetic purposes. These uses have been and will continue to be adversely affected to the extent that the freight rate structure, as modified thus far in Ex Parte 281, encourages destruction of virgin timber, the unnecessary extraction of nonrenewable resources, and the discharge and accumulation of otherwise recyclable materials."

On July 10, 1972, the District Court filed an opinion, 346 F.Supp. 189, and entered an injunction prohibiting the Co nmission "from permitting," and the railroads "from collecting" the 2.5% surcharge "insofar as that surcharge relates to 1;00ds being transported for purposes of recycling, pending further order of this court."

10 The court dismissed as most that part of the complaint relating to the Commission's February 1 order because that order had expired by its own terms on June 5. Since the environmental groups have not appealed from the judgment below, we have before us for review only the District Court's action with regard to the Commission's April 24 order that allowed the surcharge to continue until November 30, 1972.

The court also concluded that since the Commission had taken no final action with respect to the 4.1% selective increase, the lawfulness of that tariff was not ripe for review. The court did, however, retain jurisdiction over the case to review the final order of the Commission.

The court first rejected the contention that the appellees were without standing to sue because they allegedly had no nore than "a general interest in seeing that the law is enforced," id., at 195, and distinguished our recent decision in Sie. ra Club v. Morton, 405 U.S. 727, on the [*682] basis that, unlike the petitioner in Sierra Club, the environmental are: and that this use was disturbed by the environmental impact caused by nonuse of recyclable goods.

Second, the court found that its power to grant an injunction was not barred by our decision in Arrow Transportatior Co. v. Southern R. Co., 372 U.S. 658, 667, where we held that in enacting 49 U.S. C. § 15 (7), Congress had intentionally vested "in the Commission the sole and exclusive power to suspend" and withdrew "from the judiciary any pre-existing power to grant injunctive relief." The court reasoned that NEPA "implicitly confers authority on the [** '267] federal courts to enjoin any federal action taken in violation of NEPA's procedural requirements" "so long as the review is confined to a determination as to whether the procedural requisites of NEPA have been followed." 346

Finally, turning to the merits, the court concluded that the Commission's April 24 decision not to suspend the surcha ge for the statutory seven-month period was a "major Federal action significantly affecting the quality of the human env ronment." Id., at 199. On the premise that an environmental impact statement is required "whenever the action arguably will have an adverse environmental impact," id., at 201, the court held that "the danger of an adverse impact is sufficiently real to require a statement in this case." Ibid.

The District Court declined to stay its injunctive order pending appeal to this Court, and on July 19, 1972, THE CH EF JUSTICE, as Circuit Justice for the District of Columbia Circuit, denied applications to stay the preliminary injunction. 409 U.S. 1207. On December 18, 1972, we noted probable jurisdiction of the appeals filed by the [*683] Uni ed States, the Commission, and the railroads. 409 U.S. 1073.

11 While subsequent events do not bear directly on the validity of the District Court's action in granting the preliminary injunction, they do highlight the problems that hover in the background of this litigation.

On October 4, 1972, the Commission served its report and order in Ex parte 281 approving, with some exceptions, the general increases filed by the railroads. Increased Freight Rates and Charges, 1972, 341 I. C. C. 290. In that report, although the Commission gave extensive consideration to environmental aspects of the rate increases, it declined to include a formal environmental impact statement because it concluded that its actions "will neither actually nor potentially significantly affect the quality of the human environment" Id., at 314.

The selective increases were to become effective on October 23, 1972, but the Commission delayed until November 12 the effective date for rate increases on recyclable commodities in order to allow the submission of comments by interested parties. Upon the submission of critical comments, the Commission, in an unreported order served on November 8, reopened the rate proceeding in Ex parte 281 for further evaluation of the rates on recyclable commodities, and ordered the proposed selective tariff increases on those commodities suspended for the full seven-month period authorized by statute — until June 10, 1973. Accordingly, with respect to recyclable commodities on which the proposed selective increase had been suspended, the Commission extended the expiration date of the 2.5% surcharge until June 10, 1973, the expiration date for the suspension of the selective increases. But the Commission acknowledged that the power to collect the surcharge on these recyclable commodities was barred by the preliminary injunction issued by the District Court in the present case and which is the subject of the present appeals. In short, the temporary 2.5% surcharge would have been in effect throughout this period on recyclable commodities but for the District Court's resilient preliminary injunction.

Whether the Commission deliberately continued the surcharge beyond the time it would have been supplanted by the selective increases in order to give the surcharge and the District Court's injunction continuing effect and thus avoid mooting this litigation, and whether the Commission acted beyond its powers under 49 U. S. C. § 15 (7) by suspending the selective increases for a second seven-month period and by treating the District Court's injunction as having continuing effect, are questions not raised here. No party now maintains that these cases are moot. Cf. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515.

Both sets of appellees filed motions in the District Court: SCRAP sought a preliminary injunction against the Commission's October 4 order, and EDF and the other intervening plaintiffs sought leave to file an amended and supplemental complaint and requested other relief. On January 9, 1973, the court deferred consideration of the EDF motions and denied SCRAP's request for a preliminary injunction. The court found that as a result of the Commission's November 8 order, neither the selective rate increases nor the temporary surcharge could be assessed on recyclable commodities. Consequently, the court found, no injunctive relief was justified as to those materials. While the permanent rate increase approved by the Commission in Ex parte 281 was then being collected on shipments of all other commodities, and although the Commission had concededly failed to file an impact statement, the court concluded that "the danger of an adverse impact appears to be sufficiently speculative . . . that it would be unsound to grant preliminary relief." The court continued: "The record indicates that many railroads are in dire financial straits — some on the verge of bankruptcy — and badly need the revenues now being obtained under the Commission's rate increase. The increase amounts to some \$ 340 million per year, and were this revenue flow halted it could not easily be recouped should it later appear that no NEPA statement was necessary." The merits of neither the Commission's October 4 order nor the District Court's January 9 decision are before us, and we therefore express no opinion on them.

On May 7, 1973, the Commission served its final environmental impact statement relating to the selective rate increases on recyclable commodities. It concluded that the proposed increases would have no significant adverse effect on the environment. Contending that the impact statement was inadequate, EDF and SCRAP sought to enjoin collection of the selective rate increases. On June 7, 1973, the District Court temporarily enjoined the railroads from collecting the selective increases on recyclable commodities. On June 8, 1973, THI: CHIEF JUSTICE, as Circuit Justice for the District of Columbia Circuit, stayed the District Court's injunction pending further order of this Court.

[**2414] II

[***268] [***LEdHR1] [1]The appellants challenge the appellees' standing to sue, arguing that the allegations in the pleadings as to standing [*684] were vague, unsubstantiated, and insufficient under our recent decision in Sierra Club v. Morton, supra. The appellees respond that unlike the petitioner [**2415] in Sierra [*685] Club, their pleadings sufficiently alleged that they were "adversely affected" or "aggrieved" within the meaning of § 10 of the / d-ministrative Procedure Act (APA), 5 U. S. C. § 702, 12 and they point specifically to the allegations that their members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities. The District Court found these allegations sufficient to withstand a motion to dismiss. We agree.

12 Like the petitioner in Sterra Club, the appellees here base their standing to sue upon the APA, 5 U. S. C. § 702, which provides;

[HN3] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The petitioner in Sierra Club, "a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations," 405 U.S., at 739, sought a declaratory judgment and an injunction to restrain federal officials from approving the creation of an extensive ski-resort development in the scenic Mineral King Valley of the Sequoia National Forest. The Sierra Club claimed standing to maintain its "public interest" lawsuit because it had "a [***269] special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country...." Id., at 730. We held those allegations insufficient.

[*686] [***LEdHR2] [2]Relying upon our prior decisions in Data Processing Service v. Camp, 397 U.S. 150, and Bar. ow v. Collins, 397 U.S. 159, we held that § 10 of the APA [HN4] conferred standing to obtain judicial review of ager cy action only upon those who could show "that the challenged action had caused them 'injury in fact,' and where that the agencies were claimed to have violated." 405 U.S., at 733."

As in Sierra Club, it is unnecessary to reach any question concerning the scope of the "zone of interests" test or its application to this case. It is undisputed that the "environmental interest" that the appellees seek to protect is within the interests to be protected by NEPA, and it is unnecessary to consider the various allegations of economic harm on which the appellees also relied in their pleadings and which the Government contends are outside the intended purposes of NEPA.

[***LEdHR3] [3] [***LEdHR4] [4] [HN5] In interpreting "injury in fact" we made it clear that standing was not confined to those who could show "economic harm," although both Data Processing and Barlow had involved that kind of injury. Nor, we said, could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. Rather, we explained: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." Id., at 734. Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all thos: who use those [*687] resources suffered the same harm, deprives them of standing.

In Sierra Club, though, we went on to stress the importance of demonstrating that the party seeking review be himself [**2416] among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders. No such specific injury was alleged in Sierra Club. In that case the asserted harm "will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort," id., at 735, yet "the Sierra Club failed to allege that it or it members would be affected in any of their activities or pastimes by the . . . development." Ibid. Here, by contrast the appellees claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area.

Unlike the specific and geographically limited federal action of which the petitioner complained in Sterra Club, the chal enged agency action in this case is applicable to substantially [***270] all of the Nation's railroads, and thus alles edly has an adverse environmental impact on all the natural resources of the country. Rather than a limited group of prisons who used a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in Sterra Club demonstrated the patent fact that persons [*688] across the Nation coul I be adversely affected by major governmental actions. See, e.g., Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1097 (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Reade v. Ewing, 205 F.2d 630, 631-632 (interests of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration). To deny standing to persons who are in fair injuried simply because many others are also injured, would mean that the most injurious and widespread Government ent actions could be questioned by nobody. We cannot accept that conclusion.

But the injury alleged here is also very different from that at issue in Sterra Club because here the alleged injury to the environment is far less direct and perceptible. The petitioner there complained about the construction of a specific project that would directly affect the Mineral King Valley. Here, the Court was asked to follow a far more attenuated line of causation to the eventual injury of which the appellees complained—a general rate increase would allegedly caus increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area. The railroads protest that the appellees could never prove that a general increase in rates would have this effect, and they contend that these allegations were a ploy to avoid the need to show some injury in fact.

[***LEdHR5] [5] [***LEdHR6] [6] [***LEdHR7A] [7A] [***LEdHR8A] [8A] Of course, [HN6] pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that Le has been or will in fact be perceptibly harmed by the challenged agency action, [*689] not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. But we deal here simply with the pleadings in which the appellees alleged a spec fic and perceptible harm that distinguished them from other citizens who [**2417] had not used the natural resource: that were claimed to be affected. "If, as the railroads now [***271] assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. "We cannot say on these pleadings that the appellees [*690] could not prove their allegations which, if proved, would place them squarely among those persons injured in fact by the Commission's action, and entitled under the clear import of Sierra Club to seek review. The District Court was correct in denying the appellants' motion to dismiss the complaint for failure to allege sufficient standing to brir g this lawsuit.

[***LEdHR7B] [7B]

- The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. [HN7] "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "apprived," and it serves to distinguish a person with a direct stake in the outcome of a litigation even though small from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see Baker v. C pr., 369 U.S. 186; a \$ 5 fine and costs, see McGowan v. Maryland, 366 U.S. 420; and a \$ 1.50 poll tax, Harper v. Virginia Bd. of Elections, 383 U.S. 663. While these cases were not dealing specifically with § 10 of the AP.A., we see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613. See also K. Davis, Administrative Law Treatise §§ 22.09-5, 22.09-6 (Supp. 1970).
- 15 The railroads object to the fact that the allegations were not more precise that no specific "forest" was named, that there was no assertion of the existence of any lumbering camp or other extractive facility in the area. They claim that they had no way to answer such allegations which were wholly barren of specifics. But, if hat were really a problem, the railroads could have moved for a more definite statement, see Fed. Rule Civ. Proc. 12 (e), and certainly normal civil discovery devices were available to the railroads.
- [***LEdHR8B] [8B]Similarly, the District Court cannot be faulted for failing to take evidence on the issue of standing. This case came before the court on motions to dismiss and for a preliminary injunction. If the railroads thought that it was necessary to take evidence, or if they believed summary judgment was appropri ite, they could have moved for such relief.

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[***LEdHR9A] [9A]We need not reach the issue whether, under conventional standards of equity, the District Court was justified in issuing a preliminary injunction, because we have concluded that the court lacked jurisdiction to enter an injunction in any event.

The District Court enjoined the Commission from "permitting," and the railroads from "collecting," the 2.5% interim surcharge on recyclable commodities. Finding that NEPA implicitly conferred authority "on the federal courts to enjoin any federal action taken in violation of NEPA's procedural requirements," 346 F.Supp., at 197, it concluded that our decision in Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, did not affect judicial power to issue an injunction in the circumstances of this case. We cannot agree.

In Arrow, the Commission had suspended a railroad's proposed rates for the statutory seven-month period, and he railroad had voluntarily deferred the proposed rate [*691] for an additional five months. When the Commission had not reached a final decision within that period, the railroad announced its intent to [**2418] adopt the new rates. In a suit brought to enjoin the railroad from effectuating that change, we held that the courts were without power [***272] to issue such an injunction. From the language and history of § 15 (7) of the Interstate Commerce Act, we concluded that Congress had vested exclusive power in the Commission to suspend rates pending its final decision on

their lawfulness, and had deliberately extinguished judicial power to grant such relief. The factual distinctions between the p esent cases and Arrow are inconsequential.

[***LEdHR10] [10]It is true that the injunction in Arrow was sought after the statutory seven-month period had expired and thus represented an attempt to extend judicially the suspension period, while here the injunction was issued during the suspension period. But Arrow was grounded on the lack of power in the courts to grant any injunction before the Commission had finally determined the lawfulness of the rates, and that holding did not depend on the fact that the a railability of the Commission's power of suspension had passed. Indeed, the federal court decisions cited and approved in Arrow involved instances where the courts had been asked to enjoin rates during the statutory seven-month period. See, e.g., M. C. Kiser Co. v. Central of Georgia R. Co., 236 F. 573, aff'd, 239 F. 718; Freeport Sulphur Co. v. United States, 199 F.Supp. 913; Bison S. S. Corp. v. United States, 182 F.Supp. 63; Luckenbach S. S. Co. v. United States, 179 F.Supp. 605, 609-610, vacated in part as moot, 364 U.S. 280; Carlsen v. United States, 107 F.Supp. 398.

[***LEdHR11A] [11A] Similarly, there is no significance in the fact that, unlike Arrow, the injunction in this litigation ran against the Commission as well as the railroads. The only [*692] way in which the Commission could comply with the court's order would be to exercise its power of suspension and suspend the surcharge. The injunction constitutes a direct interference with the Commission's discretionary decision whether or not to suspend the rates. It would turn Arrow into a sheer formality and effectively amend § 15 (7) if a federal court could accomplish by injunction a gainst the Commission what it could not accomplish by injunction directly against the railroads. And, again, the federal court decisions on which Arrow relied were for the most part cases in which the courts had held that they were with ut power to compel the Commission to grant a rate suspension. See, e. g., Bison S. S. Corp. v. United States, supra; "uckenbach S. S. Co. v. United States, supra; Carlsen v. United States, supra; cf. Freeport Sulphur Co. v. United States, supra."

[***LEdHR[1B] [[1B]

16 EDF suggests that the April 24 order of the Commission was in fact a final order finding the surcharge "just and reasonable," not simply a refusal to suspend the surcharge. But the Commission's reference to the "just and reasonable" nature of the surcharge was a preliminary assessment commonly made in suspension orders. See, e. g., the suspension orders quoted in Naph-Sol Refining Co. v. United States, 269 F.Supp. 530, 531; Oscar Mayer & Co. v. United States, 268 F.Supp. 977, 978-979. It did not represent a final determination by the Commission that any particular rate was just and reasonable. Indeed the Commission made it clear in its February 1 order that the surcharge was not considered a prescribed rate within the meaning of Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U.S. 370, and was subject to complaint and investigation under the Act.

[***LEdHR9B] [9B] [***LEdHR12A] [12A] Thus, the only arguably significant distinction between the present litigation and Arrow is that [***273] here the Commission allegedly failed to comply with NEPA. However, w: cannot agree with the District Court that NEPA has amended § 15 (7) sub silentio and created an implicit exception to Arrow so that judicial power to grant injunctive [*693] relief in this case has been revived. "NEPA, [**2419] one of the recent major federal efforts at reversing the deterioration of the country's environment, declares [HN8] "that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner of calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U. S. C. § 4331. To implement these lofty purposes, Congress imposed a number of respon: ibilities upon federal agencies, most notably the requirement of producing a detailed environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (2)(C). "But [*694] nowhere, either in the legislative history or the statutory language, is there any indication that Congress intended to restore to the federal courts the power temporarily to suspend railroad rates, a power that had been clear y taken away by § 15 (7) of the Interstate Commerce Act.

[***LEdHR12B] [12B]

An alternative ground for avoiding the Arrow decision, which was suggested but not relied on by the District Court, was that the surcharge here was an "agency-made" rate, not a "carrier-made" rate. Moss v. CAB, 430 F.2d 891, which was cited by the court is, however, plainly inapposite. There the CAB suspended the rates proposed by the carriers, but suggested in their place "a complete and innovative scheme for setting all passenger rates for the continental United States." Id., at 899. It was clear that when the carriers filed the rates sug-

gested by the Board they would not be suspended. "Even a cursory reading of the order makes it clear that the Board told the carriers what rates to file; it set forth a step-by-step formula requiring major changes in rate-making practices and in rates which it expected the carriers to adopt." Id., at 899-900. Here, by contrast, the level and structure of the rates were proposed entirely by the carriers. While the Commission suggested an expiration date for the surcharge, this was simply to make the surcharge expire when the general selective increases went into effect. This expiration date and the other standard conditions attached to the Commission's refusal to suspend the surcharge did not, in any meaningful sense, transform the carrier-made rate into a Commission-made rate.

18 See n. 8, supra.

[***LEdHR13] [13] [***LEdHR14] [14]The statutory language, in fact, indicates that NEPA was not intended to repeal by implication any other statute. Thus, [HN9] 42 U. S. C. § 4335 specifies that "the policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies," and [HN10] 42 U. S. C. § 4334 instructs that the Act "shall [not] in any way affect the specific statutory obligations of any Federal agency "Rather than providing for any wholesale overruling of prior law, NEPA requires all federal agencies to review their "present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of [NEPA] and shall propose to the President . . . such measures as may be necessary to bring their suthority and policies into conformity [***274] with the intent, purposes, and procedures set forth in [NEPA]." 42 U. S. C. § 4333. It would be anomalous if Congress had provided at one and the same time that federal agencies, which have the primary responsibility for the implementation of NEPA, "must comply with present law and ask for any neces: ary new legislation, but that the courts may simply ignore what [*695] we described in Arrow as "a clear congressional purpose to oust judicial power " 372 U.S., at 671 n. 22. [**2420] "

- 19 See Greene County Planning Board v. FPC, 455 F.2d 412, 420; Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 146 U. S. App. D. C. 33, 43, 449 F.2d 1109, 1119; City of New York v. United Sta es, 337 F.Supp. 150, 160; Cohen v. Price Comm'n, 337 F.Supp. 1236, 1241.
- The argument that NEPA implicitly restored to the courts the injunctive power that § 15 (7) had dives ed is similar to a contention rejected in *Arrow* itself. There the petitioners claimed that congressional adoption of the National Transportation Policy, 54 Stat. 899, had implicitly altered § 15 (7). They claimed that the proposed new railroad rates would drive the barge lines out of existence, contrary to the congressional declaration of concern for the protection of water carriers threatened by rail competition. The Court concluded that "nothing in the National Transportation Policy, enacted many years after ... § 15 (7), indicates that Congress intended to revive a judicial power which ... was extinguished when the suspension power was vested in the Commission."

 **Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, 673. In addition, the Court noted that, as is also true with NEPA, the mandate was directed not to the courts but to the Commission. There is nothing about NEPA that makes it any more amenable for finding an implicit amendment of § 15 (7), than the National Transportation Policy was.

[***LEdHR15A] [15A]The District Court pointed to nothing either in the language or history of NEPA that suggests a restoration of previously eliminated judicial power. While it relied primarily on the decisions of the Court of Appeals for the District of Columbia Circuit in Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 146 U. S. App. D. C. 33, 449 F.2d 1109, and Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U. S. App. D. C. 380, 46: F.2d 783, neither case supports an injunction under the circumstances of this case. Calvert Cliffs' held that a feder il court had power to review rules promulgated by the Atomic Energy Commission, and there the court ordered further consideration of the rules on the ground that there had not been compliance with NEPA. In Committee for Nuclear Responsibility it was held that federal courts had jurisdiction to consider whether an executive decision to conduct a nuclear test had satisfied the procedural requirements [*696] of NEPA. The question here, however, is not whether there is general judicial power to determine if an agency has complied with NEPA, and to grant equitable relief if it has not, cf. Arrow Transportation Co. v. Southern R. Co., supra, at 671 n. 22; Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, but rather whether in a specific context NEPA sub silentic revived judicial power that had been explicitly eliminated by Congress. Calvert Cliffs' and Committee for Nuclear Responsibility have nothing to say on this issue, for neither was concerned with a specific statute that restricts the power of the federal courts to grant injunctions.

[***LEdHR15B] [15B]

21 Indeed Calvert Cliffs' indicated that the requirements of § 102 of NEPA, see n. 8, supra, did not have to be complied with, if such compliance was precluded by another statutory provision. 146 U. S. App. D. C., at 39, 449 F.2d, at 1115. And Committee for Nuclear Responsibility, in another context, endorsed a principle, equally applicable here, that "repeal by implication is disfavored." 149 U. S. App. D. C. 380, 382, 463 F.2d 783, 785.

Our [***275] conclusion that the District Court lacked the power to grant the present injunction is confirmed by the fact that each of the policies that we identified in *Arrow* as the basis for § 15 (7) would be substantially undermined if the courts were found to have suspension powers simply because noncompliance with NEPA was alleged.

First, Arrow found that the Commission had been granted exclusive suspension powers in order to avoid the diverse results that had previously been reached by the courts. District courts had differed as to the existence and scope of any power to grant interim relief, with the consequence that the uniformity of rates had been jeopardized, and different shippers, carriers, and areas of the country had been subjected to disparate treatment. Similarly, since a suit to enjoin a national rate increase on NEPA grounds could be brought in any federal district court in the country, see 28 U. S. C. [engendering] \$\frac{5}{2284}\$, 2321-2325, the result might easily be that the courts would [*697] "[reach] diverse results, . . . [engendering] confusion and [producing] competitive inequities." 372 U.S., at 663. In short, a rate increase allowed in New York might be disallowed in New Jersey.

Second, we stressed in Arrow that § 15 (7) represents a careful accommodation of the various interests involved. The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers. On the other hand, Congress was aware that if the Commission did not act within the suspension period, then the new rates would automatically go into effect and the shippers would have to pay increased rates that might eventually be found unlawful. To mitigate this loss, Congress authorized the Commission to require the carriers to keep detailed accounts and eventually to repay the increased rates if found unlawful. To allow judicial suspension for noncompliance with NEPA, would disturb this careful balance of interests. A railroad may depend for its very financial life on an increased rate, and the rate may be perfectly just and reasonable. Granting an injunction against that rate based on the Commission's alleged noncompliance with NEPA, although the Commission had determined not to suspend the rate, would deprive the railroad of vitally needed revenues and result in an unjustified windfall to shippers.

Finally, we found in Arrow that any survival of a judicial power to grant interim injunctive relief would represent an undesirable interference with the orderly exercise of the Commission's power of suspension. Similarly, to grant an injunction in the present context, even though not based upon a substantive consideration of the rates, would directly interfere with the Commission's decision as to when the rates were to go into effect, and would ignore our conclusion in would be out of harmony with the uniformity of rate levels fostered by the doctrine of primary jurisdiction." 372 U.S., at 668. As the Court of Appeals for the Second Circuit explained in Port of New York Authority v. United States, 451 F.2d order refusing to suspend rates:

[***276] "The basis of the decision in Arrow -- that to permit judicial interference with the Commission's suspension procedures would invite the very disruption in the orderly review of the lawfulness of proposed tariffs that Congress meant to preclude -- applies with equal force to the issue now before us."

Accordingly, because the District Court granted a preliminary injunction suspending railroad rates when it lacked the power to do so, "its judgment must [**2422] be reversed [*699] and the cases remanded to that court for further proceedings consistent with this opinion.

22 In view of our conclusion that there was no power to grant the preliminary injunction, it is unnecessary for us to reach the other questions posed by the parties. For example, the Government and the railroads urge that, because of the pressures of time, an environmental impact statement is not required at the suspension stage of a rate proceeding, and, in any event, a decision by the Commission whether or not to suspend rates is not subject to judicial review. See Port of New York Authority v. United States, 451 F.2d 783; Oscar Mayer & Co. v. United States, 268 F.Supp. 977; M. C. Kiser Co. v. Central of Georgia R. Co., 236 F. 573; Freeport Sulphur Co. v. United States, 199 F.Supp. 913; Luckenbach S. S. Co. v. United States, 179 F.Supp. 605; Carlsen v. United States, 107 F.Supp. 398. The appellees in turn contend that some compliance with NEPA is possible at the sus-

pension stage, and that such compliance is required if the statute is to be enforced "to the fullest extent poss ble." See 42 U. S. C.§ 4332. And they urge that there is, or should be, an exception to the general principle of noure-viewability of suspension decisions for those cases where the Commission has acted beyond its statutory authority, or in violation of a clear statutory command or a procedural requirement, a standard that the appellees view as broad enough to encompass alleged noncompliance with NEPA. See Naph-Sol Refining Co. v. United States, 269 F.Supp. 530, 532; Oscar Mayer & Co. v. United States, supra, at 982 (Doyle, J., concurring); Long Island R. Co. v. United States, 193 F.Supp. 795. We express no view on any of these issues.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

CONCUR BY: BLACKMUN; MARSHALL (In Part)

CONCUR

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring.

I join the Court's judgment and its opinion, but because of the presence of the first sentence of Part III of the opinion, and to avoid any misunderstanding as to my posture, I add a few words.

For the reasons stated in my dissenting opinion in Sierra Club v. Morton, 405 U.S. 727, 755 (1972), I would hold that the appellees here have standing to maintain this action based on their allegations of harm to the environment resulting from the Commission's order of April 24, 1972. And, in evaluating whether injunctive relief is warranted, I would not require that the appellees, in their individual capacities, prove that they in fact were injured. Rather, I would require only that appellees, as responsible and sincere representatives of environmental interests, show that the environment would be injured in fact and that such injury would be irreparable and substantial.

DISSENT BY: DOUGLAS (In Part); WHITE (In Part); MARSHALL (In Part)

DISSENT

MR. JUSTICE DOUGLAS, dissenting in part.

These cases present important environmental problems. They concern [***277] ratemaking for the shipment of [*700] litter for recycling. Paper, glass, and metals are the main items in today's garbage. 'As indicated by the Bureau of Mines in Appendix I to this opinion, America's method of disposing of garbage is either to use it for landfill or to put it first through incinerators and then to bury the residue. Sorting and recycling have several environmental impacts; (1) reduction in the use of incinerators lessens air pollution; (2) establishing or encouraging removal of litter from the land-scape; (3) recycling saves both renewable and nonrenewable resources. As respects the last, the tons of paper that are recycled, rather than burned, can be translated into the number of standing trees that need not be cut for pulp the next year; the metals recycled protect our remaining nonrenewable supplies of ore, and so on.

In a Bureau of Mines' survey, it was established that metals and glass account for approximately 75 percent of the weight of the residues in municipal incinerator waste. Economics of Recycling Metals and Minerals from Urban Refuse, Bureau of Mines Technical Progress Report No. 33, p. 2 (Apr. 1971). From these materials, if recycled, familiar products such as bottles, newspapers, iron ingots, paper pulp, fuel oil, and methar e gas can be manufactured. In addition, new products are being developed, such as glassphalt for street paving, insulation, glass wool, and glass bricks, in various colors that meet specifications for "severe weather" facing brick. Id., at 7.

This project was launched under the Resource Recovery Act of 1970, 84 Stat. 1227, 42 U. S. C. § 3251 et seq., under which the Secretary of HEW was authorized to provide technical and financial assistance in planning and developing resource recovery and solid waste disposal programs.

For a detailed account of a Resource Recovery Mill see Ross, How to Succeed in Recycling, Environmental Quality Magazine, June 1973, p. 51.

Rates fixed so as to encourage vast shipments of litter are, therefore, perhaps [**2423] the most immediate and dramatic illustration of a policy which will encourage protection [*701] of the environment against several erosive conditions. I would, therefore, affirm the eminently responsible decision of the District Court. 346 F.Supp. 189.

2 The necessity of reasonable transportation rates is even more apparent when it is realized that the volume of residue which is processed at a major recycling plant is between 250 and 1,000 tons per day. (Economics of Recycling Metals and Minerals from Urban Refuse, supra, n. 1, at 1.) Massive bulk transportation is therefore essential to these plant operations.

The problem is even more critical in urban areas where there is a high concentration of solid waste being generated and transportation to outlying recycling plants is a major cost factor. In 1968 a national survey found that an average of 8.2 pounds of waste per capita was collected daily in urban areas; this figure has now risen to 9 pounds. If present trends continue, this figure could be as high as 12 pounds in another 10 years. In our urban areas as a whole, the solid waste generated is fast approaching a ton a year for each man, woman, and child. Kramer, Energy Conservation and Waste Recycling, Science and Public Affairs 13, 17 (Apr. 1973).

The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 et seq., declares a congressional policy

"which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the [***278] Nation; and to establish a Council on Environmental Quality," 42 U. S. C. § 4321.

That broad policy is further expounded in § 4331 (b) to include, *inter alia*, the objective that "the Nation may . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings . . . and (6) enhance the quality of renewable resources and . . . depletable resources."

[*702] The Government urges that appellees do not have standing to challenge the administrative determination of railroad freight rate increases. SCRAP alleged in its amended complaint that its members suffered environmental and economic injury as a result of the alleged increase, because the increase diminished the total amount of waste recyrate increase, more expensive in the marketplace. In addition, SCRAP alleged that each of its members in fact used the "forests, rivers, streams, mountains, and other natural resources..." for recreational purposes, and these uses were adversely affected because the Commission's rate increases discourage the reuse of recyclable commodities, such as bottles and cans, and encourage the depletion of natural resources.

In Sierra Club v. Morton, 405 U.S. 727, 734, this Court stated that, "We do not question that [environmental] harm may amount to an 'injury in fact' sufficient to lay the basis for standing under . . . the APA [5 U. S. C. § 702]. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. "The members of SCRAP have clearly alleged an "injury in fact" to the environment and to their own personal continued use of it.

"There is nothing unusual or novel in granting the consuming public standing to challenge administrative actions."

Office of Communication of United Church of Christ v. FCC, 123 U. S. App. D. C. 328, 359 F.2d 994. This Court

[**2424] has indicated that where "statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." Data Processing Service v. Camp, 397 U.S. 150, 154.

[*703] Littering is a commonplace phenomenon that affects every person, almost everywhere. From reports and writings we know that littering defaces mountain trails, alpine meadows, and even our highest peaks. Those in the valleys are often almost inundated with litter. Where a river is polluted and a person is dependent on it for drinking water, I suppose there would not be the slightest doubt that he would have standing in court to present his claim. I also suppose there is not the slightest doubt that where smog settles on a city, any person who must breathe that air or feel the sulphuric acid forming in his eyes, would have standing in court to present his claim. I think it is equally obvious that any resident of an area whose paths are strewn with litter, whose parks, or picnic grounds are defaced by it has standing to tender his complaint to the court. Sierra Club v. Morton, supra, would seem to cover this case, for littering abetted [***279] by the failure to recycle would clearly seem to implicate residents to whom "the aesthetic and recreational values of the area" are important. Id., at 735. For the reasons stated in my opinion in Sierra Club v. Morton, supra, I

agree with the Court that appellees have standing, but like MR. JUSTICE BLACKMUN, I would not require appellees, in their individual capacity, to prove injury in fact. As MR. JUSTICE BLACKMUN states, it should be sufficient if appellees, "as responsible and sincere representatives of environmental interests, show that the environment would be injured in fact. . . ."

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The Council on Environmental Quality (CEQ), created in the Executive Office of the President, 42 U. S. C. § 4342, estimated in 1969 that this Nation produced more than 4.3 billion tons of solid refuse, including about 30 million tons of paper, 30 million tons of industrial fly ash, 15 million tons of scrap metal, 4 million tons of [*704] plastics, 100 million automobile tires, 30 billion bottles, 60 billion cans, and millions of discarded automobiles and appliances. First Annual Report of CEQ, Aug. 1970, pp. 107-113. It reported that while most of the secondary material could be reused as a replacement for virgin material, only a small fraction was recycled. *Ibid.* One of the reasons for the absence of recycling was the high cost both of collection of the material and the transportation costs. *Ibid.*

As noted, one of the purposes of the Act was to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." 42 U. S. C. § 4331 (b)(6). On October 9, 1970, Chairman Russell Train of CEQ wrote the Interstate Commerce Commission as follows:

"The Council on Environmental Quality is deeply concerned with all facets of environmental quality. Solid waste disposal is one important aspect of the total pollution problem, and recycling is a new and desirable alternative to solid waste disposal which the Council strongly supports. The degree to which this technique will be used depends almost entirely on economics. Transportation costs, to the degree they increase secondary or scrap materials costs compared to the raw materials with which they compete, act as a disincentive to recycling. The Council believes that several rail haul costs biases currently exist and would like to discuss these cases with you. . . . In general, across-the-board percentage increases only widen existing price biases against secondary materials. Also, these increases raise the costs of doing business which can hinder the salvage and reclamation industry.

"In light of the President's concern with environmental quality, the growing [**2425] problems of solid waste [*705] and the importance of recycling to alleviating them, I would like to express the Council's hope that the Interstate Commerce Commission's actions on the key issue of scrap material transportation rates will be consistent with the Nation's environmental quality goals." App. 68.

In December 1971 substantially all the railroads filed with the Commission a request to impose a 2.5% surcharge on virtually all freight. The procedural details [***280] which followed are not presently material. Suffice it to say that shippers of recyclable materials submitted verified statements in support of their view that rate increases would intensify the disincentives to shipment and use of recyclable materials. Thus the Institute for Scrap Iron and Steel submitted a study showing:

"(1) Present scrap markets are retarded because of transport rates which encourage the usage of iron ore. (2) Future scrap markets are being affected because new investment that would logically be directed to scrap-intensive steel-making is diverted because of the existing freight rate structure to ore-intensive steelmaking. (3) Iron ore (a limited domestic natural resource) is being exploited when it can and should be conserved. (4) Some scrap iron that should be recycled is unable to move, thus the environment is despoiled by unnecessary accumulations of solid metallic waste." T. Barnes, Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap (Jan. 14, 1972).

The Commission instituted a proceeding concerning the guidelines which environmental impact statements required under the Act should follow. 339 I. C. C. 508. A spokesman for the eastern railroads filed an impact statement which said that "any possible adverse environmental impact in the form of reduced movements of commodities. [*706] by rail will come only if we fail to provide adequate and efficient service" and that the need of the railroads to that end was for increased revenues. Appellees filed a protest and a request for a suspension of the proposed surcharge alleging that the present railroad rate structure discourages the movement of "recyclable" goods and that the surcharge would further discourage recycling.

The Commission, allowing the surcharge for a limited period, found that it would "have no significant adverse effect in the movement of traffic by railway or on the quality of the human environment" within the meaning of the 1969 Act. See 340 I. C. C. 358; 341 I. C. C. 287. Chairman Train of CEQ protested to the Commission on October 30, 1972:

"It is understandable that difficulties will be encountered in quantifying the environmental consequences of an incremental freight rate increase on recyclable materials. In our view, however, these consequences must be assessed in

the light of the rate disparity between secondary and primary materials that gives rise to the problem in the first place. This disparity is a matter of an entirely different magnitude, calling for a thorough environmental assessment as a precond tion to determining whether subsequent incremental increases require additional environmental impact statements. ... Clearly at some point increases which might be individually 'insignificant' become cumulatively 'significant.' In addition, the claim that freight rates on recycled products must be increased to respond to 'emergency' revenue needs pend ng completion of the required, overall environmental evaluation, loses much of its force as months turn into years and the basic investigation remains uncompleted. Finally, even the 'emergency' argument itself, however legitimate, in [*70"] no way forecloses the consideration of alternatives which would both meet revenue needs and at the same time avoic further potential environmental damage [***281] while the basic [**2426] rate structure issue is being resolved. Alternatives of this sort were, in fact, suggested in the partial dissenting opinions of Commissioners Brown and Deason (who would have denied approval of increases for recyclable commodities), with no indication in the Commission's majority report that such measures would not have been sufficient to meet the revenue needs relied on to justify the rate increases. . . . In summary, the Council feels that the basic environmental issues related to the existing freight rate structure and changes thereto, must be evaluated in a logical, analytical and timely fashion in compliance with the requirements of the National Environmental Policy Act. The Commission's actions to date appear to be inconsistent with the objectives of NEPA, and the analyses undertaken to date by the Commission appear to offer an inadequate basis from which to draw conclusions concerning the impact of freight rates on recycling and environmental quality. Our staff is available to discuss the NEPA procedural issues as well as to assist in structuring the analytical work required to assess adequately the environmental impact of freight rates." 3 App. 87-89.

In his report before the Senate, Senator Jackson, one of the three legislators most responsible for NEPA, stated: "To insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures. Section 102 authorizes and directs all Federal agencies, to the fullest extent possible, to administer their existing laws, regulations, and policies in conformance with the policies set forth in this act. It also directs all agencies to assure consideration of the environmental impact of their actions in decision-making. It requires agencies which ronmental matters and to include any comments made by those agencies which outline the environmental considerations involved with such proposals.

"Taken together, the provisions of section 102 directs [sic] any Federal agency which takes action that it must take into account environmental management and environmental quality considerations." 115 Cong. Rec. 40416 (1969).

[*708] The three-judge District Court held that the conclusion of the Commission that the rate increase would have "no significant adverse effect" on the environment within the meaning of EPA was "transparent" and "a ruse." 346 F.Supp., at 200-201. This leads to an analysis of § 102 of NEPA.

4 The totality of § 102 is so important to this litigation that I have set it forth in Appendix II to this dissent.

That section is directed to "all agencies of the Federal Government," which of course includes the Interstate Commerce Commission. It directs the agency to interpret and administer "the policies, regulations, and public laws" which it administers "to the fullest extent possible" in accordance with the policies of EPA. It directs the agency to include in "riajor Federal actions significantly affecting the quality of the human environment" a detailed statement "by the responsible official on — (i) the environmental [***282] impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship [*709] between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. [**2427] Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, . . . and shall accompany the proposal through the existing agency review processes. *83 Stat.

5 Senator Jackson was reported as saying:

"We expected Section 102 of the act which requires environmental impact statements and analysis of alternatives for all major federal actions significantly affecting the quality of the human environment to force the agencies to move.... We did not anticipate that it would be private parties through the courts that would force the compliance. This is what has made it work." Cahn, Can Federal Law Help Citizens Save Nature's Fragile Beauty?, Christian Science Monitor 12 (Feb. 28, 1973).

Rates affecting litter, like rates affecting other commodities, obviously are relevant to the ease and expedition with which it will be transported. To get the litter to appropriate recycling plants in the quantities needed to protect our fast depleting forests and our nonrenewable resources and to relieve our landscape of the litter that plagues us may need special incentive rates.

6 Waldo E. Smith, of the American Geophysical Union, recently stated: "The total supply of most metals is sharply limited; even now we must dig deeper, go farther, and use lower grade ores. No optimism is justified here. The supply can be extended substantially by intelligent recycling, which should be an important by-product of our cleaning up to maintain a clean environment." Resources and Long-Forecasts, Science and Public Affairs 21, 22 (May 1973).

The report, H. R. Conf. Rep. No. 91-765, makes clear that no agency of the Federal Government is exempt and that each should comply unless existing law applicable to the agency "expressly prohibits or makes full compliance [*710] with one of the directives impossible." The report states:

"The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency, compliance is required. Thus, it is the intent of the conferees that the provision to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations [***283] to avoid compliance." Id., at 9-10.

The District Court, acting responsibly in light of the broad and clear-cut policy of the Act concluded that it sets a "high standard" for federal agencies, that there is no "escape hatch for footdragging agencies," that the Act does not make the preparation and use of these impact statements "discretionary," that Congress did not intend that this Act be "a paper tiger." 346 F.Supp., at 199.

When Congress desires exceptions to be made to the impact statement requirement under the NEPA, express exemption is provided. For example, Pub. Law 92-307, 86 Stat. 191, provides that the Atomic Energy Commission can grant a temporary operating license for a nuclear power reactor without the completion of an environmental impact statement, if the application for the operating license was filed before September 9, 1971, and the Commission holds a hearing which leads to the findings, among others, that the operation of the facility during the period of the temporary operating license in accordance with its terms and conditions will provide adequate protection of the environment during that period and that the operation of the facility is essential toward insuring the power-generating capacity of a utility system. The Commission is empowered to impose such terms and conditions as it deems necessary, and its decision is subject to judicial review.

Some federal agencies are taking affirmative action to promote the purposes of § 105. Thus the Securities and Exchange Commission recently adopted amendments to its registration and reporting forms to require more meaningful disclosure of certain items pertaining to the effect on the issuer's business of compliance with federal, state, and local laws and regulations relating to the protection of the environment. The amendments will require as a part of the description of the issuer's business, appropriate disclosures with respect to the material effects which compliance with environmental laws and regulations may have upon the capital expenditures, earnings, and competitive position of the issuer and its subsidiaries. Other amendments describe the extent to which litigation disclosures should contain specific descriptions of environmental proceedings. Securities and Exchange Comm'n Release (Securities Act Rel. No. 5386, Apr. 20, 1973). See Scientists' Institute v. AEC, 156 U. S. App. D. C. 395, 481 F.2d 1079, holding that an impact statement must be filed for the Atomic Energy Commission's liquid metal fast breeder reactor program.

[*711] [**2428] Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, does not preclude review here. In Arrow there were rates which the Commission had the power to suspend but had not suspended. The power of suspension was entrusted to the Commission only; and we held that the courts should not intrude when the Commission has not acted. Here the Commission has acted; it has found that "the increases here proposed are just and reasonable, that the revenues derived therefrom will result in earnings [*712] and rates of return . . . not in excess of that required to enable" the carriers "to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service." Ex parte 281, Order of Feb. 1, 1972 (unreported). The Commission said it was not prescribing rates, though it attached conditions on approval of the rates without suspension. It made clear it would suspend the new rates if the conditions were not added. As stated by the three-judge court: "A suspension decision which effectively blackmails the carriers into submitting agency-authored rates is functionally indistinguishable from an agency order setting those rates." 346 F.Supp., at 197.

Moreover, as the three-judge court held and as Judge Friendly [***284] observed in City of New York v. United States, 337 F.Supp. 150, 164, "NEPA is a new and unusual statute imposing substantive duties which overlie those imposed on an agency by the statute or statutes for which it has jurisdictional responsibility."

The Court today greatly weakens NEPA in a crucially important segment of the federal environmental field. Movement of litter to recycling plants * is critically important, as Chairman Train makes abundantly clear. The alternative is to leave it underfoot or to cart it off as garbage to incinerators that pollute the air or to landfills that are getting more and more difficult to find. * We know that recycled paper, recycled copper, recycled [*713] iron, and recycled glass are practical. The Federal Bureau of Mines in its pilot plant at Edmonston, Maryland, boasts that "urban ore," as it calls this debris, costs about \$ 3 a ton and recycled is worth \$ 11 a ton. We know that we deal here with nonrenewable [**2429] resources. We are told that recycling paper saves thousands of acres of trees a year. "

8 Senator Jackson recently was reported as saying about these impact statements;

"We also should be able to get generic environmental impact statements -- updated every six months or so -for energy policy, transportation policy, and other major policy decisions," Cann. supra, n. 5.

- 9 Most of the Nation's waste is relocated into dumps with only approximately 10% to 15% finding its way into sanitary landfills. Kramer, supra. n. 2, at 17.
- 10 Congressman Dingell, another main sponsor of NEPA, recently was reported as saying:

"The success of the environmental impact statements is not so much that they were used as we intended they should, but that citizens have been able to use the process as a [way] to get into courts. . . . Some agencies are complying poorly. They decide what they are going to do and then write an environmental impact statement to support the decision. That is not what Congress had in mind. I am fearful that we are breeding a race of impact statement writers who put all the right words down but don't really get environmental concerns involved in the decision-making process. The impact statement itself is not important. The important thing is that proper judgments are made reflecting environmental considerations in the decision-making process. The impact statement should be a discipline for this and also a process by which the public can be informed and brought into the decision-making process." Cahn. supra. n. 5.

For a recent account of impact statements on transportation problems see Robert Cahn (former member of CEQ), Environmentalists Wary of Transport Trend, Christian Science Monitor 12 (Feb. 28, 1973).

Under the Act, the appraisal by the Council on Environmental Quality of which Russell Train is the chairman is a weighty one, for under § 204 of the Act it has the responsibility "to appraise the various programs and activities of the Federal Government" in light of the policy of the Act and "to develop and recommend . . . national policies to foster and promote the improvement of environmental quality." 83 Stat. 855; 42 U. S. C. §§ 4344 (3), (4). CEQ is, in other words, the expert ombudsman in the environmental area.

[*714] The apparent tendency among federal agencies, Congressman Dingell says, " is to decide first what they want to do and then prepare an impact statement as an apologia for what they have done. That puts the cart before the horse. That is what the Commission did here. But that is to adopt "an excessively narrow construction" of its statutory power "to avoid compliance" with the new environmental standards — all as condemned in the Conference [***285] report, supra, at 10. That is to say, environmental considerations are, so far as possible, to shape all agency policies and decisions.

These cases are, indeed, Exhibit A of the current practice of federal agencies to undermine the policy announced by Congress in NEPA. Rail rates were long discriminatory in retarding the industrial development of the South. New York v. United States, 331 U.S. 284. The present rates are arguably discriminatory against the removal of the litter which is about to engulf us. The wisdom of Chairman Train, rather than the technical maneuvers of the Commission, should be our guide.

I would affirm the judgment of the District Court.

APPENDIX I TO OPINION OF DOUGLAS, J., DISSENTING IN PART

The Bureau of Mines had at Edmonston, Maryland, for several years an incinerator residue processing plant on the basis of which Lowell, Massachusetts, instituted its Resource Recovery Project.

The Edmonston project is now engaged in recycling of raw waste and the following is the Bureau's description of the nature and scope of that project.

[*715] FACT SHEET

Edmonston (Md.) Solid Waste Recycling Project Bureau of Mines

DEPARTMENT OF THE INTERIOR

An important part of the solid waste utilization research carried on by the Bureau of Mines is to develop methods and processes for recycling mineral materials present in urban refuse. Engineers from the Bureau's College Park [**2430] (Md.) Metallurgy Research Center operate a pilot plant at Edmonston, Maryland, where they reclaim ferrous metals, nonferrous metals, glass, plastics, and paper from raw unburned refuse. The following facts are pertinent to the research underway at the Edmonston pilot plant.

- xxx 100 pounds of typical municipal refuse contains: 36.6 pounds of paper and cardboard; 20.2 pounds of garbage; 8.4 pounds of metal; 8.5 pounds of glass; 17.4 pounds of leaves, grass, hedge clippings and tree prunings; 2.6 pounds of scrap wood; 1.1 pound of plastics; and 5.2 pounds of miscellaneous material including leather, rubber, textiles, bricks, stones, and dirt.
- xxx -- Urban refuse generated in the U.S. in 1972 totaled 300 million tons, or the equivalent of more than 8 pounds daily for every man, woman, and child.
- xxx Only 220 million tons of municipal refuse was regularly collected by public agencies and private firms. The remainder (80 million tons) was abandoned, dumped at the point of origin, or hauled to uncontrolled disposal sites.
- xxx -- The volume of municipal refuse accumulating in the U.S. in a single year would cover an area half the size of the State of Connecticut (2,500 sq. mi.) with a layer of refuse 1 foot deep. This refuse contains some 12 million tons of iron and steel, 13 million tons of glass, and over a million tons of aluminum, zinc, lead, tin, and copper.
- xxx Collecting and disposing of refuse costs cities an average of \$ 23 per ton (\$ 18, for collection and \$ 5, for disposal). New York City, at a cost of \$ 40 per ton, spends almost a million dollars each day to collect and dispose of solid waste. Total U.S. bill runs about \$ 6 billion annually.
- xxx -- Most municipal refuse is disposed of by dumping, landfill, or incineration. About 30 million tons of manicipal refuse is [*716] burned annually in more than 300 municipal incinerators. These incinerators generate 7.5 million tons of residues, which are then buried. The process developed by the Bureau to reclaim the values from incinerator residues has attracted worldwide attention. A commercial size plant of this type will soon be under construction in Lowell, Massachusetts, with seventy-five percent of the \$ 3.2 million required, being provided by the Environmental Protection Agency.
- [***286] xxx -- Successful reclamation of mineral values from incinerator residues at the Bureau's pilot plant prompted research to save also that part of municipal refuse that is now being lost during burning. This would reduce the need for building more municipal incinerators, saving their construction and operating costs, and would bring income from salvaged paper and plastics as well as metals and glass. It would also eliminate air pollution problems connected with incineration.
- xxx -- Equipment for mechanical separation of metals, glass, paper, and plastics from municipal refuse before incineration has been assembled at Edmonston. The process involves coarse shredding of the refuse, followed with air

classification, magnetic separation, screening, optical sorting, electrostatic separation, and gravity concentration - all proven methods used in the minerals industries.

- EXX Other refuse recycling schemes have been proposed and some are [**2431] already under development. The process developed by the Bureau is unique in the following major respects: (1) it is the only process that embodies a complete system, (2) it is the only process capable of capturing and concentrating putrescibles and glass, (3) it is the only process that produces a tin can product suitable for detinning, (4) it is the only process capable of accepting extremely massive pieces of metal, (5) it is the only process that can successfully separate plastics and paper, and (6) energy requirements for the Bureau's process are by far the least of all proposed processes.
- xxx A plant processing 1,000 tons of raw refuse per day could be expected to reclaim each day enough ferrous metal to make all the iron and steel parts for more than 55 4-door sedans.
- EXX About 36 billion bottles are discarded each year in the U.S. as solid waste. Each American discards a glass bottle on the average of about one every two days. The average returnable beer bottle used to make 31 round trips from the brewery, to the consumer, and back to the brewery. The average is now [*717] 19 trips. In some cities, it is only 4. People are discriminating less between returnable and non-returnable bottles.
- EXX -- Glass reclaimed from raw refuse can be used in making new glass, or for such salable products as building bricks, mineral wool for insulation, and road surfacing (when ground and mixed with asphalt).
- XXX Aluminum present in refuse in the form of cans alone amounts to 10 percent of the total primary production. This metal together with other aluminum recovered from refuse would find a ready market at existing secondary smelters for conversion to high grade casting alloys.
- XXX The other heavy nonferrous metals could be used readily in producing brass ingot or the mixture could be further refined and separated into the constituent metals.
- EXX -- The rate at which we generate refuse is growing so fast that within 20 years, even if we are able to recycle 70 percent of our solid wastes our needs for landfill space will remain the same. And landfill space is, even now, becoming harder and harder to find.

[Refuse-disposal and refuse-recovery charts appear on pp. 718 and 719 respectively.]

- [*718] [SEE URBAN REFUSE DISPOSAL IN THE UNITED STATES 1972 IN ORIGINAL]
- [*719] [SEE BUREAU OF MINES DRYSORT REFUSE RECOVERY [**2432] SYSTEM IN ORIGINAL]
- [*720] [***289] [**2433] APPENDIX II TO OPINION OF DOUGLAS, J., DISSENTING IN PART

Section 102 of the National Environmental Policy Act, 42 U. S. C. § 4332 provides:

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall --

- (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
- (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate [**2434] consideration in decisionmaking along with economic and technical considerations;
- (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
 - (i) the environmental impact of the proposed action,
 - [*721] (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed actionshould it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

- (D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
- (E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy [***290] of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international [*722] cooperation in anticipating and preventing a decline in the quality of mankind's world environment;
- (F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;
 - (G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and
 - (H) assist the Council on Environmental Quality established by subchapter II of this chapter.
 - Pub. L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853.
- MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting in part.

I would reverse the judgment of the District Court and order the complaint dismissed because appellees lack standing to bring this suit. None of our cases, including inferences that may be drawn from dicta in Sierra Club v. Morion, 405 U.S. 727 (1972), where we denied standing to petitioner there, are sufficient to confer standing on plaintiffs in circumstances like these. The allegations here do not satisfy the threshold requirement of injury in fact for constituting a justiciable case or controversy. The injury alleged is that the failure of the Commission to suspend a 2.5% freight rate increase may discourage the transportation of recyclable materials, thus retarding the use of recycled materials, causing further consumption of our forests and natural resources (some of which might be taken from the Washington metropolitan area), and resulting in [**2435] more refuse and undisposable materials to further pollute the environment.

The majority acknowledges that these allegations reflect an "attenuated line of causation," ante, at 688, but is willing to suspend its judgment in the dim hope that proof at trial will in some unexplained way flesh [*723] them out and establish the necessary nexus between these appellees and the across-the-board rate increase they complain of. To me, the alleged injuries are so remote, speculative, and insubstantial in fact that they fail to confer standing. They become no more concrete, real, or substantial when it is added that materials will cost more at the marketplace and that somehow the freight rate increase will increase air pollution. Allegations such as these are no more substantial and direct and no more qualify these appellees to litigate than allegations of a taxpayer that governmental expenditures will increase his taxes and have an impact on his pocketbook, Massachusetts v. Mellon, 262 U.S. 447, 486-489 (1923), or allegations that governmental decisions are offensive to reason or morals. The general "right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted" does not confer standing to litigate in federal courts. Fairchild v. Hughes, 258 U.S. 126, 129 (1922). New York did not have standing to complain when it asserted merely the possible adverse effects of diversion of water from Lake Michigan upon hypothetical [***291] power developments in "the indefinite future." New York v. Illinois, 274 U.S. 488, 490 (1927). Assumed potential invasions are insufficient bases for a justiciable case or controversy. Arizona v. California, 283 U.S. 423, 462 (1931). As I see the allegations in this case, they are in reality little different from the general-interest allegations found insufficient and too remote in Sierra Club. If they are sufficient here, we are well on our way to

permitting citizens at large to litigate any decisions of the Government which fall in an area of interest to them and with

Assuming, however, that a majority of the Court adheres to the conclusion that a constitutional case or controversy exists in these circumstances and that plaintiffs [*724] may sue, I would agree that the District Court erred in entering an injunction which Congress quite clearly had long since divested it of the power to enter. Accordingly, I join Part III of the Court's opinion. I add only that failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are -- far beyond the reach of recycling plants that as a

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I fully agree with and join in Part II of the Court's opinion wherein it sustains the District Court's determination that the appellees have standing to challenge the 2.5% interim surcharge on the ground that the Interstate Commerce Commission's order of April 24 permitting the surcharge to take effect was not issued in compliance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4321 et seq. The Court goes on, however, to hold in Part III of its opinion that the District Court lacked power to issue a preliminary injunction barring implementation of the surcharge due to the Commission's alleged failure to comply with NEPA in the suspension stage of the rate proceeding. The Court's decision in this respect is, to be sure, a very narrow one; the decision clearly concerns only the scope of remedies available to the District Court in the context of a case of this particular character, 1 that is, an ICC rate suspension [**2436] case. [*725] The Court specifically refrains from deciding whether or not the Commission's alleged failure to comply with NEPA in the suspension stage is a proper subject for judicial review and, if so, what would constitute adequate compliance with NEPA at that juncture in the administrative process. See ante, at 698-699, n. 22. Nonetheless, I am unable to join the third portion of the Court's opinion, for I am convinced that there is no lack of judicial power to issue a preliminary injunction against the [***292] interim surcharge in the context of these cases. I therefore must respectfully dissent from Part III of the Court's opinion.

I Given that the Court holds only that the District Court lacked power to grant preliminary injunctive relief, it presumably remains open to appellees to challenge the Commission's alleged failure to comply with NEPA in the suspension stage of the proceedings concerning the interim surcharge in an action for declaratory relief. Nor does anything in the Court's opinion today deny to the district courts power to enjoin the Commission to comply with NEPA in the context of a particular rate proceeding so long as no injunction is issued barring implementation of the rates themselves, cf. Atchison, T. & S. F. R. Co. v. Wichita Board of Trade, post, p. 800.

At the outset, it is essential for purposes of analysis to put the issue upon which the Court disposes of the cases in proper perspective. Since the Court addresses only the issue of the District Court's power to grant preliminary relief, we must, of course, assume for the sake of argument that the issues which the Court does not now reach -- namely, whether the procedural requirements of NEPA 1 are applicable at the suspension stage and whether the issue of Commission compliance is a proper one for judicial review - are to be decided in appellees' favor. In addition, we must accept for the present appellees' assertions that the interim surcharge, by raising [*726] the cost of shipping recyclable materials, will further accentuate the allegedly unjustifiable disparity between the cost of shipping those materials and the cost of shipping primary goods, thereby irrationally encouraging the use of primary goods which will lead to a further degradation of our environment. In other words, in considering the question of judicial power, we must accept the correctness of the District Court's determination that there was a "strong likelihood" that the Commission had erred in its conclusion that the interim surcharge "will have no significant adverse effect on . . . the quality of the human environment within the meaning of the Environmental Policy Act of 1969," 346 F.Supp., at 200, 201, a conclusion that had effectively excused the Commission from compliance with the procedural requirements of NEPA in the context of

- See in particular § 102 (2)(C) of the Act, 42 U. S. C. § 4332 (2)(C).
- Cf., e. g., Upper Pecos Assn. v. Stans, 452 F.2d 1233 (CA10 1971), vacated and remanded for consideration of mootness sub nom. Upper Pecos Assn. v. Peterson, 409 U.S. 1021 (1972); Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 146 U. S. App. D. C. 33, 449 F.2d 1109 (1971); City of New York v. United States, 337 F.Supp. 150, 158-160 (EDNY 1972).

Turning then to the issue of judicial power, it must first be recalled that we deal here with the grant of only a preliminary injunction; the District Court did not permanently enjoin enforcement of the interim surcharge upon determin-

ing that the Commission had, in all likelihood, failed to comply with NEPA in the suspension stage. Properly viewed, I think the injunction at issue in this case amounts to nothing more than a legitimate effort by the District Court, following the Commission's refusal to suspend the surcharge, to maintain the status quo pending final judicial determination of the legality of the Commission's action at the suspension stage in light of the requirements of NEPA. And, by now, the equitable power of the federal courts to grant interim injunctive relief pending determination of an appeal is well established. The nature of that power was explored at length by [**2437] the Court in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942), where it was held that a court of appeals had power, pending determination of an appeal, [*727] to stay the Federal Communications Commission's grant of a construction permit although the Federal Communications Act made no provision [***293] for such a stay. Speaking for the Court, Mr. Justice Frankfurter explained:

"No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." Id., at 9-10.

See also FTC v. Dean Foods Co., 384 U.S. 597, 604 (1966); Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U.S. 411, 425 (1965).

This Court has consistently adhered to the view that it will find federal courts to have been deprived of their traditional power to stay orders under review only in the face of the clearest possible evidence of a congressional intent to do so. See Scripps-Howard Radio, Inc. v. FCC, supra, at 11, 15. No such clear intent is to be found in the Interstate Commerce Act, at least not with respect to a case such as this where the Commission has already acted on the relevant issue and the issue lies in an area outside the Commission's traditional expertise. In Arrow Transportation Co. v. Southern R. [*728] Co., 372 U.S. 658, 664 (1963), this Court specifically acknowledged that "it cannot be said that the legislative history of the grant of the suspension power to the Commission includes unambiguous evidence of a design to extinguish whatever judicial power may have existed prior to [the establishment of suspension powers in the Commission] to suspend proposed rates." The Arrow Court was asked to extend by injunction the statutory seven-month suspension period, see 49 U. S. C. § 15 (7), because the Commission had not reached a decision on the lawfulness of the proposed rates at the end of the suspension period and the rail carriers, following a period of voluntary suspension, were threatening to implement the rate change without awaiting final agency action. Despite the ambiguity of the legislative history, the Court, upon careful examination of the character of and reasons for the suspension scheme, concluded that Congress must have intended to deprive the federal courts of the power to suspend rates pending completion of agency action and thus that the traditional equitable powers of the federal courts had been overridden to that extent. But, as detailed consideration of the factors that motivated the decision in Arrow reveals, this litigation presents a significantly different problem.

4 Thus, I cannot accept the Court's assertion that the question here is "whether in a specific context NEPA sub silentio revived judicial power that had been explicitly eliminated by Congress." Ante, at 696. That is a question which I do not believe need ever be reached here, for — as shall be seen — Congress has not, to begin with, deprived the federal courts of their traditional equitable powers in the context of these cases.

The [***294] Arrow Court felt that an injunction extending the suspension period pending final agency action would involve a serious, unintended intrusion on the primary jurisdiction of the Commission. This problem of primary jurisdiction had two aspects in Arrow. First, [**2438] where the issue is the reasonableness of proposed rates, an application for an injunction against implementation of [*729] those rates pending final agency action would necessarily require a federal court "to pass before final Commission action upon the question of reasonableness of a rate." 372 U.S., at 671, thereby providing, in effect, an advisory judicial opinion to the Commission on an issue which Congress intended that the Commission decide in the first instance. Certainly, the Commission's expertise in matters of rail carrier operations and economics is well recognized, and Arrow clearly indicates that the courts should not interfere with the exercise of that expertise. However, the grant of preliminary relief here involves no such interference with the Commission's initial exercise of its particular expertise.

So far as I am aware, the Commission has never been deemed especially expert in matters of environmental policy or impact. It is, of course, true that the Commission must decide in the first instance whether particular proposed action

constitutes "major Federal action significantly affecting the quality of the human environment," thus necessitating agency compliance with the detailed requirements of § 102 (2)(C) of NEPA, 42 U. S. C. § 4332 (2)(C). But that decision had already been made in this case prior to the time when judicial intervention by the District Court was sought -in contrast to the situation in Arrow where the question of the reasonableness of the rates remained unresolved by the Commission. Even assuming that some element of agency expertise is involved in the decision at issue here, the District Court, in granting preliminary relief against the interim surcharge, passed only upon a question of which the Commission had finally disposed, namely, the environmental impact of not suspending the interim surcharge [*730] and of permitting it to take effect at once. Thus, for purposes of the particular issue raised here, the District Court was presented with final agency action and was not in danger of interfering with the Commission's expertise when it stayed the Commission's order pending final determination of the appeals.

- 5 Administrative expertise in such matters is surely lodged with the Environmental Protection Agency and the
- Cf. L. Jaffe, Judicial Control of Administrative Action 688 (1965).
- Contrast Atchison, T. & S. F. R. Co. v. Wichita Board of Trade, post, p. 800.

The other aspect of the problem of primary jurisdiction focused upon in Arrow was the timing of the implementation of new rates. The Court concluded that Congress had intended that the Commission should determine when new rates should take effect. See 372 U.S., at 668. Insofar as the economic impact of rate increases was concerned, Congress enacted a scheme which permitted the Commission to take into account the interests of both rail carriers and shippers. Thus, Congress recognized that economic necessity might persuade the Commission to permit [***295] otherwise questionable rates to go unsuspended while they were being investigated, and, at most, it allowed the Commission to suspend proposed rates for only seven months, see 49 U. S. C. § 15 (7). At the same time, Congress attempted to accommodate the economic interests of shippers, for it gave the Commission power, pending final agency action, to require the rail carriers to maintain detailed records of monies received due to the increase and to compel payment of refunds if a rate increase was ultimately found to be unreasonable. * See ibid.

Moreover, even if the Commission fails to require recordkeeping and the payment of refunds sua sponte, Congress also provided a mechanism by which shippers may initiate an action before the Commission to seek reparations from a carrier on the ground that particular rates are unreasonable. See 49 U. S. C. § 13 (1).

Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658 (1963), to be sure, did not involve an economic dispute between shippers and rail carriers, but was, instead, an action brought by water carriers which contended that certain challenged decreases in the rates of competing rail carriers were designed to destroy them rather than to reach legitimate economic objectives. Obviously, the refund and reparation provisions of the Interstate Commerce Act were of no more value to the water carriers in Arrow than they are to the nonshipper appellees in this case. But, as the Court pointed out in Arrow, "conflicts over rates between competing carriers were familiar to the Commission long before [the enactment of the suspension provisions] . . . Indeed, in another provision [namely, 49 U. S. C. § 4 (2)] of the very same statute [that established the suspension powers] Congress . . . dealt explicitly with the reduction of rates by railroads competing with water carriers . . . In addition § 8 of the Act, 49 U. S. C. § 8, creates a private right of action for damages -- based upon conduct violative of the Act -which might be available " 372 U.S., at 669. Thus, Congress had taken into account, and had provided for, disputes between competing carriers, as well as between shippers and carriers, in enacting the suspension provisions. The same can hardly be said for conflicts between the environmental policies of NEPA and the Commis-

[*731] [**2439] But where does the Interstate Commerce Act make provision for an accounting and "refund" to the people of our Nation for the irreversible ecological damage that results from a rate increase which discriminates unreasonably against recyclable materials and has been allowed to take effect without compliance with the procedural requirements of NEPA? The Court today says that "to allow judicial suspension for noncompliance with NEPA, would disturb the careful balance of interests" struck by Congress in the suspension and refund provisions. Ante, at 697. Yet the simple fact is that in the [*732] carefully designed suspension and refund scheme no balance was struck with respect to the environmental interests that have been recognized by Congress in NEPA since the introduction of the suspension provisions into the Interstate Commerce Act. Under these circumstances, we can hardly infer an intent on the part of Congress to deprive the federal courts of their traditional responsibility, in passing upon a request for equitable relief, to work an accommodation in each particular case of the competing interests [***296] of the relevant parties " -- that is, of a rail carrier's alleged need for increased income that will otherwise be forever lost each day that the

new rate is not charged and of the extent of irreversible environmental damage that might result if the rates are not suspended. The District Court, in its effort to preserve the status quo pending final review of the Commission's April 24 order, gave full consideration to the effects on all parties of either granting or denying preliminary relief against the interim surcharge. In then temporarily enjoining the surcharge, I believe that the District Court acted within the scope of its legitimate powers.

- 9 Indeed, given the substantial element of public interest at stake in a case such as this, it is appropriate to recall Mr. Justice Stone's off-quoted admonition: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian R. Co. v. Systems Federation No. 40, 300 U.S. 515, 552 (1937).
 10 Cf. Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944).
- 11 Thus, the District Court, fully recognizing the financial plight of the rail carriers, carefully limited its preliminary injunction to the application of the interim surcharge to recyclable materials, "allowing [the rail carriers] to collect the surcharge on all nonrecyclable goods." 346 F.Supp., at 202.

To summarize, then, I obviously cannot agree with the Court's assertion that "each of the policies that we identified in Arrow as the basis for § 15 (7) would be substantially undermined if the courts were found to have suspension powers simply because noncompliance with NEPA was alleged." Ante, at 696. In [**2440] Arrow itself, the Court was at pains to point out that its decision [*733] did not "reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." 372 U.S., at 671, n. 22. True, the Court went on to say there that "such power . . . has never been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act." Ibid. But the import of that remark must be judged with a full understanding of the factors underlying the Arrow Court's finding of "such a clear congressional purpose." As has been seen, close analysis of those factors identified certainly does not compel extension of the Arrow holding to the request for preliminary injunctive relief in this litigation. 12 The Court would do [***297] well to remember [*734] that "where Congress wished to deprive the courts of [their] historic power [to enjoin orders pending review], it knew how to use apt words. . . . " Scripps-Howard Radio, Inc. v. FCC, 316 U.S., at 17. Cf. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). Nothing in the language of the Interstate Commerce Act or in the particular structure of that Act or even in our decision in Arrow compels the conclusion that Congress has done so here. I must therefore dissent from the Court's ultimate disposition of these cases.

12 The Arrow Court also pointed out that experience with judicial injunctions against rates prior to the establishment of the Commission's suspension powers in § 15 (7) had "resulted in disparity of treatment as between different shippers, carriers, and sections of the country, causing in turn 'discrimination and hardship to the general public," 372 U.S., at 664. These results were due both to the conflicting views of lower federal courts as to their power to enjoin rates pending agency determination of their lawfulness and conflicting judgments of different courts as to the reasonableness of the same rates. See id., at 663-664. But the danger of conflicting judgments concerning the same rates and unevenhanded treatment of shippers and carriers, merely because of the fortuity of the particular judicial district in which they are located, is not present where, as here, the allegation is that the Commission has failed to follow the requirements of a statute -- NEPA -- relevant to the exercise of its regulatory jurisdiction and the Commission has, as a consequence, been joined in the suit as a defendant. So long as the Commission has been made a party, it is possible to ensure uniformity of treatment by enjoining the Commission to exercise its suspension powers where a failure to comply with NEPA is believed to exis; This is what the District Court did here when it enjoined the Commission "from permitting . . . the 2.5 per cent surcharge" to be collected by the rail carriers "pending further order of this court." See Jurisdictional Statement 30a. It may be that the danger of conflicting results where the Commission has not been made a party would warrant a court staying its hand, but that is not a problem here.

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ALR Digests, Administrative Law 168; Interstate Commerce Commission 3, 7, 8

L Ed Index To Anno, Administrative Law; Commerce; Parties

ALR Quick Index, Administrative Law; Capacity To Sue Or Be Sued; Carriers

Federal Quick Index, Administrative Law; Interstate Commerce Commission; Parties

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The doctrine of primary administrative jurisdiction. 94 L Ed 806,1 L Ed 2d 1596.

Construction and application of Federal Administrative Procedure Act. 94 L Ed 631, 95 L Ed 473, 97 L Ed 884.

Standing of private citizen, association, or organization to maintain action in federal court for injunctive relief against commercial development or activities, or construction of highways, or other governmental projects, alleged to be harmful to environment in public parks, other similar recreational areas, or wildlife refuges. 11 ALR Fed 556.

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12/06/2010 11:00 AM

Fw: Dec. 6 -- BNA, Inc. Daily Environment Report - Breaking News: Supreme Court to Review

Utility Industry Challenge to Greenhouse Gas Nuisance Suit

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Breaking News

Supreme Court to Review Utility Industry Challenge to Greenhouse Gas Nuisance Suit

Posted December 6, 2010, 10:50 A.M. ET

The U.S. Supreme Court announced Dec. 6 that it will hear a challenge to a court of appeals decision allowing several states to maintain a public nuisance lawsuit against American Electric Power Co. and other utilities for their greenhouse gas emissions (American Electric Power Co. v. Connecticut, U.S., No. 10-174, certiorari granted 12/6/10).

AEP and three other power companies filed a petition for writ of certiorari Aug. 2, asking the Supreme Court to review a decision by the U.S. Court of Appeals for the Second Circuit. In September, 12 states joined the Obama administration and several industry and labor groups to file amicus briefs in support of the petition.

The court considered the petition in conference Dec. 3 (232 DEN A-11, 12/6/10).

The AEP case is being closely watched by environmental advocates and industry. If the lawsuit by Connecticut, other states, and environmental groups were to go forward, it would signal that the court is allowing challenges to a company's greenhouse gas emissions under nuisance law, which would provide environmental advocates with another tool to try to curb emissions.

If the Second Circuit decision were upheld, it would allow parties to go directly to court to seek a remedy, rather than rely on regulatory agencies alone. The Environmental Protection Agency is due to begin regulating emissions from large sources in January, although members of Congress are trying to block, or at least delay, EPA's authority to do so.

The Second Circuit decision allowed Connecticut, seven other states, New York City, and three environmental groups to proceed with lawsuits against AEP, the Tennessee Valley Authority, and other utilities that alleged the power companies' carbon dioxide emissions constituted a nuisance under federal common law (Connecticut v. American Electric Power Co., 582 F.3d 309, 69 ERC 1385 (2d Cir. 2009)).

According to the court, Justice Sonia Sotomayor took no part in the decision over whether to grant cert in the AEP case.

Sotomayor was a member of the Second Circuit when that court heard oral arguments in Connecticut v. American Electric Power Co. The court's 2009 decision came down three years after it heard oral arguments. In that time, Sotomayor was elevated to the Supreme Court (181 DEN A-12, 9/22/09).

By Steven D. Cook

This e-mail is published as a supplement to Daily Environment Report (ISSN 1521-9402) by The Bureau of National Affairs, Inc., 1801 S. Bell Street, Arlington, VA 22202. Full reports on the contents of this e-mail will appear in the next regular edition of Daily Environment Report.

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VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

AO-1-00

September 29, 2000

Mr. Will F. Corbin Editor, Daily Press Newport News, VA

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Corbin:

This will acknowledge receipt of your letter of August 18, 2000, and the correspondence between Greg Lohr and Judith Malveaux, also of the Daily Press, and James E. Barnett, county attorney for the County of York. You have requested "illumination" on a number of issues related to the application of the Virginia Freedom of Information Act (FOIA) to e-mails between members of a public body.

 Your first question concerns the definition of the term "transaction of public business" and whether certain e-mails to or from public officials can be considered "personal" when such e-mail messages go through a government agency's e-mail database.

Under FOIA, the term "transaction of public business" is not defined. According to statutory construction rules, in the absence of a statutory definition, a statutory term is considered to have its ordinary meaning, given the context in which it is used.¹

FOIA, however, does define "public records" as all writings and recordings which consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. (Emphasis added). In order for a writing or recording to fall within the definition of "public record," it must be as described in the definition and be related to the transaction of public business. Implicit in the definition is that not all writings and recordings, etc., are public records. Because the definition of "public records" includes those stored in electronic form, e-mail messages related to public business are covered by FOIA.

Based on the foregoing, it would appear that e-mails between members of a public body that are not related to the transaction of public business are not "public records" under FOIA and therefore are not subject to its mandatory disclosure requirements. The fact that e-mail messages go through a government agency's e-mail database does not, by itself, make them public records. It is also the subject of those e-mails that determines their status as public records.

David Schnare to: schnareati

08/03/2011 03:54 PM

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Date:

05/03/2011 10:30 AM

Subject:

Re: My Lexis password

Hi David, sorry it took me so long to get back to you. I work at home on Mondays and Fridays, and I don't have access to the Lexis ID lists.

Your ID is 3X130PR 0=zero

I don't have access to your password, so if you don't know wheat it is, you can use the lost password link on the lexis.com web site, or call customer service 1-800-543-6862 for help in re-setting it.

Mary Grady

David Schnare

Mary:

05/02/2011 11:32:41 AM

From:

David Schnare/DC/USEPA/US Mary Grady/DC/USEPA/US@EPA

To: Date:

05/02/2011 11:32 AM

Subject:

My Lexis password

Mary:

I need to work from home several days this week, and want to use much of that time doing my semi-annual air enforcement case law update, for which I use Lexis. I have no idea what my password is for this, and am wondering if you are the one who maintains that, or if you know who is.

Best.

David.

David W. Schnare 202-564-4183 schnare.david@epa.gov Fw: Ford Commits to Reconsidering USCAP Membership David Schnare

to:

schnareati 05/12/2011 01:40 PM

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Subject: Ford Commits to Reconsidering USCAP Membership

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For Release: May 12, 2011

Contact: Judy Kent at (703) 759-7476 or jkent@nationalcenter.org

Ford Commits to Reconsidering USCAP Membership

Ford CEO Pressed on Ford's Membership in Anti-Energy USCAP Lobbying Group at Annual Shareholder Meeting by National Center for Public Policy Research

Washington, D.C. - Ford CEO Alan Mullaly has committed to reconsidering his company's membership in a corporate-environmental movement lobby organization, the U.S. Climate Action Partnership (USCAP), that exists solely to lobby for federal laws limiting greenhouse gas emissions.

Mullaly was pressed on the matter at the company's annual stockholder meeting by National Center for Public Policy Research Vice President David A. Ridenour. Ridenour and the National Center for Public Policy Research are Ford shareholders.

Ridenour asked Ford's management:

...My question pertains to Ford's membership in the U.S. Climate Action Partnership, a corporate-environmentalist alliance that seeks, and I quote "legislation requiring significant reductions in greenhouse gas emissions."

Ford's membership is USCAP surprising, given that Ford produces products that run on fossil fuels, less fuel efficient vehicles such as F-150s and Econoline vans accounted for 30% of your April sales, and some of its most reliable customers for these products, farmers, ranchers, and construction companies, run energy-intensive businesses that are highly sensitive to the fuel price increases Ford is lobbying for through USCAP. Furthermore, USCAP membership engenders ill-will for Ford among the new majority in Congress. Will you re-evaluate your membership in USCAP especially in light of the fact that even Government Motors, excuse me, General Motors, has withdrawn from USCAP? As has John Deere and Caterpillar?

Finally, I'd like to share with your board, with your permission, a poll we commissioned on the reaction of conservatives, who represent a strong plurality of your customers, to corporations lobbying for cap-and-trade, as Ford again effectively is doing through USCAP. We surveyed attitudes about two other corporations – but haven't surveyed opinions about Ford... yet. One corporation's

favorability rating dropped 31 points while another's dropped 50 points, because of their support for cap-and-trade. Have you fully analyzed the risks of continued USCAP membership poses to Ford's reputation?

"Don't give the keys to your cars to Washington," Ridenour concluded.

Speaking publicly in response to Ridenour, Mullaly said Ford is constantly reviewing its memberships and alliances. Without expressly using the term, he said Ford had received public relations benefits from USCAP membership, and also specifically cited the benefit of being "to participate in the drafting of [the Energy and Security Act/cap-and-trade] legislation."

Ridenour met with with Mullaly privately following the shareholder meeting and was somewhat encouraged by the message he received. Among other things, Mullay acknowledged the risk that regulation of carbon emissions could lead to government control of the auto industry and expressed concern about this possibility. He also implied that the fact that "cap-and-trade is dormant" in Congress now could be significant in terms of Ford's future approach to these issues.

"It is understandable, though intensely regrettable and keenly unfortunate, that corporate executives faced with an anti-business, anti-energy Congress felt they had to join an anti-business, anti-energy lobbying coalition to get what Quislings often call a 'seat at the table," said Ridenour after the meetings, "but the American people must press the point that if all business executives who know better were to refuse to participate in their own destruction, there wouldn't be a dangerous table at which to sit. We need to further encourage Ford, other corporate USCAP members, and the entire business community not to preemptively surrender to left-wing lobby groups. Surrender means dire costs not only to their business bottom line, but to the welfare and prosperity of the American people as a whole."

Ridenour also reminded Mullay the federal government cannot be an honest broker in energy regulation, as it has an interest in the profitability of both of Ford's two largest domestic competitors.

Corporate USCAP members, including Ford, reportedly provide sixfigure grants to the green lobby group USCAP as a condition of membership.

Following pressure from the National Center for Public Policy Research, Caterpillar, John Deere, ConocoPhillips, BP and GM have all withdrawn from USCAP. The National Center For Public Policy Research is a conservative, freemarket, non-profit think-tank established in 1982. Its 2010 revenues were over \$12 million. It is supported by the voluntary gifts of over 100,000 individual recent supporters, receiving less than one percent of its revenue from corporate sources. <u>Contributions</u> to it are taxdeductible.

-30-

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501 Capitol Court, N.E. Washington, D.C. 20002 (202) 543-4110 Fax (202) 543-5975

E-Mail: info@nationalcenter.org
Web: www.nationalcenter.org

You are subscribed to this mailing list as Schnare.David@epamail.epa.gov. Please <u>click here</u> to modify your message preferences or to unsubscribe from any future mailings. We will respect all unsubscribe requests. Fw: Final Accotink Creek Stormwater TMDL Established

David Schnare

to:

schnareati

05/02/2011 01:33 PM

Hide Details

From: David Schnare/DC/USEPA/US

To: schnareati@gmail.com

3 Attachments







Accotink Approval Letter.PDF Accotink Creek Stormwater TMDL.pdf Accotink Creek Response to Comments.pdf

David W. Schnare 202-564-4183 schnare.david@epa.gov

-----Forwarded by David Schnare/DC/USEPA/US on 05/02/2011 01:32PM -----

To: Kate.Bennett@fairfaxcounty.gov, mrbennet@usgs.gov, sbieber@mwcog.org, Carkhuff.Ann@epamail.epa.gov, HChu@viennava.gov, mark_Colonna@urscorp.com, Brian.Crawford@fcps.edu, Dawn.Dhavale@fairfaxcounty.gov, Drago.Helene@epa.gov, jflanary@fccc.org, FoleyT@vmcmail.com, afremont@fairfaxva.gov, Doug.Fritz@dcr.virginia.gov, ngoulet@novaregion.org, Nate.Grace@motivaent.com, chad.grupe@fairfaxcounty.gov, grycewicz@virginia.sierraclub.org, sharrelson@nvcc.edu, mheadly@wetlandstudies.com, chill@wegnet.com, dhodge@nvcc.edu, kenhyer@usgs.gov, president@audubonva.org, christin.jolicoeur@fairfaxcounty.gov, rcjones@gmu.edu, robertj1944@yahoo.com, steward@accotink.org, laufermax@earthlink.net, rclott@deq.virginia.gov, jim.mcglone@dof.virginia.gov, roy.mills@vdot.virginia.gov, coordinator@accotink.org,

pamela.nee@fairfaxcounty.gov, John.Odenkirk@dgif.virginia.gov,
Lynn_Petersen@deanfoods.com, robrentsch@cox.net, DREYHER@aol.com,
Pamela.Rittenhouse@fairfaxcounty.gov, Pawan.Sarang@VDOT.Virginia.gov,
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Voigt.Gregory@epa.gov, Danielle.Wynne@fairfaxcounty.gov, FriendsofAccotink@yahoo.com,
wilamena.harback@us.army.mil, melanie.frisch@us.army.mil, JMarshall@SCSEngineers.com,
Tracey.Harmon@VDOT.Virginia.gov, prez@ravensworthfarm.org, john.hoke@dnr.mo.gov,
jg@stateside.com, dietrichja@verizon.net, kate@monroe-info.com,
Ryan.Kelly@fairfaxcounty.gov, lblake@cadmusgroup.com, MLawrence@bccon.com,
Roy.Mills@VDOT.Virginia.gov, robrentsch@cox.net

From: Gregory Voigt/R3/USEPA/US

Date: 04/27/2011 02:17PM

Cc: relfarhan@louisberger.com, dbenelmouffok@louisberger.com, Erica Rabenhorst <erabenhorst@gmail.com>, dslazarus@deq.virginia.gov, Don Waye/DC/USEPA/US@EPA, "Rountree, Glynn" <grountree@nahb.org>, "Martha Marks" <mmarks@naiopva.org>, David Schnare/DC/USEPA/US@EPA, "Mike Rolband" <MRolband@wetlandstudies.com>, "Hoffman, Diane" <Diane.Hoffman@fairfaxcounty.gov>, "Hill, Lee (DCR)" <Lee.Hill@dcr.virginia.gov>, menchu-c martinez/DC/USEPA/US@EPA, Stefania Shamet/R3/USEPA/US@EPA, William Frost <William.Frost@kci.com>, Jamie Fowler/DC/USEPA/US@EPA

Subject: Final Accotink Creek Stormwater TMDL Established

Members of the Accotink Creek TMDL TAC,

This note is to inform you that EPA established a stormwater TMDL to address benthic impairments the Accotink Creek watershed on April 18, 2011. Attached, please find EPA's final TMDL report, Response to Comments Document, and Approval Letter.

EPA appreciates the feedback and assistance provided by the TAC throughout the development of this TMDL. If you have any questions, please feel free to contact me anytime.

Thank you again.

Greg Voigt

Gregory C. Voigt
Office of Standards, Assessment and TMDLs (3WP30)
US EPA Region III
1650 Arch Street
Philadelphia, PA 19103
215-814-5737

(See attached file: Accotink Approval Letter.PDF) (See attached file: Accotink Creek Stormwater TMDL.pdf) (See attached file: Accotink Creek Response to Comments.pdf)

....

Re: Farewell

David Schnare to David Schulz

09/28/2011 02:04 PM

To

David Schnare/DC/USEPA/US David Schulz/R5/USEPA/US@EPA

Couch, dog, TV, non-profit environmental law clinic.

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

David Schulz

David- I wish you well in retirement- any grand p...

09/28/2011 01:35:36 PM

From:

David Schulz/R5/USEPA/US

David Schnare/DC/USEPA/US@EPA

Date:

09/28/2011 01:35 PM

Subject:

Re: Farewell

David- I wish you well in retirement- any grand plans? All my best, Dave

Please do your part to reduce global warming. Protecting the environment is everyone's responsibility.

David Schnare

Dear Friends and colleagues: This Friday will be... 09/28/2011 10:02:43 AM



(In Archive) Form 450 Certification

Jeanne Duross to: David Schnare

This message is being viewed in an archive.

Hi David,

I hope you are doing well.

I've reviewed all the Form 450s for OCE and I've asked Adam to certify all but a handful. I held on to yours and we haven't certified it yet — not because of any particular issues (there aren't any), but just because you have a lot of outside activities listed. I'd just like the opportunity to walk through your form with you and make sure all your approvals are up to date and just to ensure that any questions you may have are answered. Can I send you a scheduler for a meeting next week? I think I would only need about 20-30 minutes of your time? Let me know if that would be OK.

05/12/2011 03:39 PM

Thanks in advance!

-Jeanne

Jeanne M. Duross Attorney-Advisor Special Litigation and Projects Division U.S. EPA (202)564-6595

May contain confidential information for internal deliberation, attorney-client information, and/or attorney work product.

Re: Dave

David Schnare to Phillip Brooks

09/29/2011 09:44 AM

Fight

David Schnare/DC/USEPA/US

To.

Phillip Brooks/DC/USEPA/US@EPA

I sent Dan (USA Today) a copy, based on his email request to me yesterday. This reporter is the one who sought the Wegman emails from GMU, a request similar to our request of Mann's emails from UVA. He has shown a propensity to defend Mann, so I don't expect he is going to be very nice to me, but that's the cost of litigating in the public interest and in the public forum. At least they aren't going through my garbage yet - something that has happened to my co-counsel.

d.

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

Phillip Brooks

Thanks. Phillip A. Brooks, Director Air Enforcem...

09/29/2011 09:39:37 AM

From:

Phillip Brooks/DC/USEPA/US

To: Date: David Schnare/DC/USEPA/US@EPA 09/29/2011 09:39 AM

Subject:

Ro: Dave

Thanks.

Phillip A. Brooks, Director Air Enforcement Division 1200 Pennsylvania Ave. N.W. Washington, DC 20460

Phone: (202) 564-0652 Fax: (202) 564-0015

David Schnare

Yes, I filed a waiver request. It's attached. At th...

09/29/2011 09:15:31 AM

From: To:

David Schnare/DC/USEPA/US Phillip Brooks/DC/USEPA/US@EPA

Date:

09/29/2011 09:15 AM

Subject:

Re: Dave

Yes, I filed a waiver request. It's attached. At the time, ATI was called WTI.

d.

[attachment "WTI outside employment request.docx" deleted by Phillip Brooks/DC/USEPA/US]

David W. Schnare, Esq. Ph.D.

202-564-4183 schnare.david@epa.gov

Phillip Brooks

USA Today called asking whether you got a wai...

09/28/2011 03:38:39 PM

From: To:

Phillip Brooks/DC/USEPA/US

David Schnare/DC/USEPA/US@EPA

Date:

09/28/2011 03:38 PM

Subject:

Dave

USA Today called asking whether you got a waiver allowing you to represent TRI. they are requesting a copy of the waiver. Do you have a copy handy? Is there one?

Phillip A. Brooks, Director Air Enforcement Division 1200 Pennsylvania Ave. N.W. Washington, DC 20460

Phone: (202) 564-0652 Fax: (202) 564-0015

Fw: Dave

David Schnare to David Schnare

09/29/2011 09:18 AM

-10-

David Schnare/DC/USEPA/US

To

David Schnare chnare@gmail.com/

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

---- Forwarded by David Schnare/DC/USEPA/US on 09/29/2011 09:18 AM -----

From:

David Schnare/DC/USEPA/US
Phillip Brooks/DC/USEPA/US@EPA

To: Date:

09/29/2011 09:15 AM

Subject:

Re: Dave

Yes, I filed a waiver request. It's attached. At the time, ATI was called WTI,

d.



WTI outside employment request dock

David W. Schnare, Esq. Ph.D. 202-564-4183 schnare.david@epa.gov

Phillip Brooks

USA Today called asking whether you got a wai...

09/28/2011 03:38:39 PM

From:

Phillip Brooks/DC/USEPA/US

To: Date: David Schnare/DC/USEPA/US@EPA

Date.

09/28/2011 03:38 PM

Subject:

Dave

USA Today called asking whether you got a waiver allowing you to represent TRI. they are requesting a copy of the waiver. Do you have a copy handy? Is there one?

Phillip A. Brooks, Director Air Enforcement Division 1200 Pennsylvania Ave. N.W. Washington, DC 20460

Phone: (202) 564-0652 Fax: (202) 564-0015



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C. 20460

Office of Enforcement and Compliance Assurance

MEMORANDUM

Date: November 16, 2010

From: David W. Schnare, Esq. Ph.D.

Attorney-Advisor

Air Enforcement Division

Thru: Greg Fried, Acting Chief

Stationary Source Enforcement Branch

Air Enforcement Division

To: Adam Kushner, Director

Deputy Ethics Officer

Office of Civil Enforcement

Subject: Approval for Outside Employment

Pursuant to 5 C.F.R. § 6401 and 5 C.F.R. § 2635, this memorandum seeks prior approval for outside employment. In accord with the above cited code and implementing regulations, please review the following information and provide approval for participation as a pro bono associate of the American Traditions Institute.

Information Required under § 6401.103

(1) Employee's name, title and grade

David W. Schnare, Attorney-Advisor GS 15/10

(2) Nature of the outside activity, including a full description of the services to be performed and the amount of compensation expected;

The American Tradition Institute is a 501(c)3 not-for-profit charitable public policy research educational and public interest law foundation. It exists to lead a national discussion about environmental issues, including air and water quality and regulation, responsible land use, natural resource management, energy development, property rights, and free-market principles of stewardship. I have been asked to serve, pro bono, as a